

No.

100-1000000

IN THE

Supreme Court of the United States

PHILADELPHIA AND READING RAILWAY COMPANY,
Petitioner,

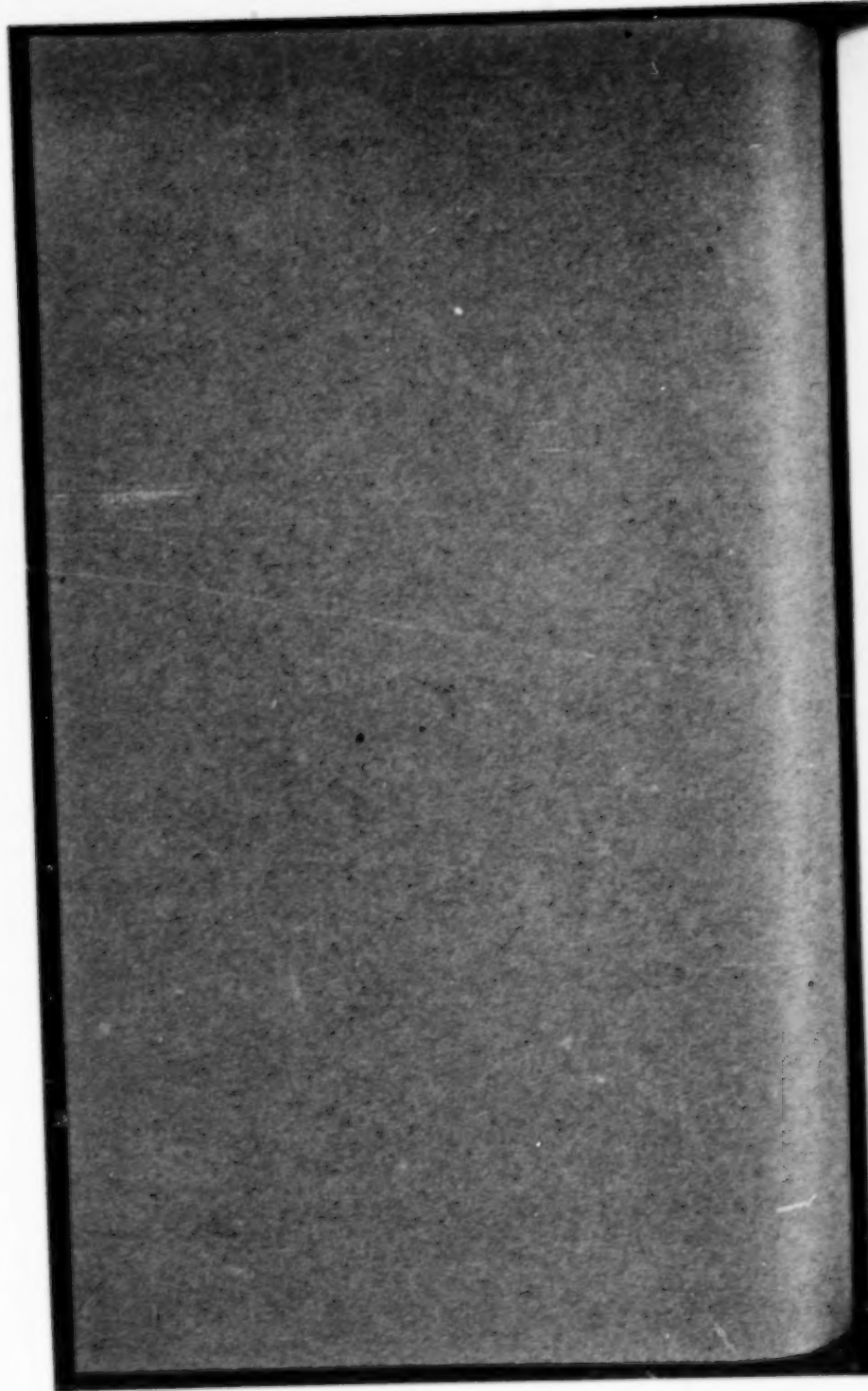
vs.

MARIA DOMENICA DIDONATO, Respondent.

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF
HABEAS CORPUS.

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PHILADELPHIA, Pa.



In the Supreme Court of the United States.

OCTOBER TERM, 1920. No.

Philadelphia and Reading Railway Company, Petitioner,

vs.

Maria Domenica DiDonato, Respondent.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

The questions involved in this case are of great importance not only to interstate carriers by railroad, and the employees of such carriers engaged in interstate commerce, but to those persons engaged in the trial of cases under the Federal Employers' Liability Act, and the Workmen's Compensation Act of Pennsylvania.

These questions are:—

I. Is a watchman employed on an interstate railroad, at a grade crossing over which interstate shipments and trains constantly pass, engaged in interstate commerce while performing his duties in flagging trains over the crossing?

II. Since in an action brought under the Workmen's Compensation Act of Pennsylvania, the bur-

den is upon the claimant to prove a case within the Act, was a *prima facie* case made out by proof that claimant's husband was employed as a crossing watchman by a common carrier by rail and that he was injured while engaging in the commerce conducted by the carrier over the tracks at the crossing?

The first question involved in this argument is raised by the findings of the Compensation Referee, which while meagre, establish that claimant's decedent was employed by the defendant as a crossing watchman at its Forrest Street Crossing, Conshohocken, that while engaged in flagging a train he was killed; that many interstate trains pass over this crossing, and that the defendant is a common carrier by rail engaged in interstate commerce (Award, page 40).

With these facts as a basis the Referee awarded compensation and the award was affirmed by the Compensation Board in an opinion, apparently based on a theory which does not seem to be in concord with the Federal law, and this decision was affirmed by the Court of Common Pleas and the Supreme Court of Pennsylvania.

Questions of classification of employment in or outside of interstate commerce are no doubt difficult enough, for it is well nigh impossible to formulate a rule of much practical assistance applicable to the almost endless diversity of circumstances arising in daily modern life. However, the application of the principle must be made to particular facts as they arise and the rule laid down by this Court by which the facts are to be tested is: "*Was the work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be part of it?*"

In **Pedersen vs. Delaware &c., Ry.**, 229 U. S. 146. An employee of an interstate railway carrier was killed while carrying a sack of rivets to be used on the morrow in repairing a bridge over which regularly passed both kinds of commerce, and although he was killed by a train operat-

ing wholly within the State where the accident happened, it was held by this Court that the case came within the Federal Act, because the bridge to be repaired was habitually used in interstate commerce as well as the other kind.

"Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. * * * The work of keeping such instrumentalities in a proper state of repair, while thus used, is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: 'Is the work in question a part of the interstate commerce in which the carrier is engaged?' True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used, it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

It will scarcely be controverted that a watchman is stationed at a grade crossing for the single purpose of protecting the crossing tracks from the dangers of collision between traffic on the railroad, and traffic on the highway.

Now a crossing is just as much a part of an interstate highway as a bridge and the protection of the one as much a part of interstate commerce as the protection of the other. Repairs to, or the maintenance of, either fall in the same category. True the case at bar differs slightly from *Pedersen* in its facts, though not in principle, for that was a case of repair, and this of protection. But can it be doubted

that the operator of, or the signaller on, a drawbridge on an interstate railroad takes an interstate character from his employment? Yet if the learned Court below is not in error the conclusion is compelled that the man on the bridge is alternately impressed with the character of each approaching train. The fallacy of this reasoning lies in treating a mere incident of the employment as the controlling factor. What was the nature of the work the man was employed to do and was doing? The answer is clear, to protect the crossing by keeping it clear for traffic either on the railroad or highway. As a necessary incident of his work he was flagging a train and since he was acting in the course of his employment he was also necessarily engaged at the same moment in closing the public highway to vehicles and pedestrians, for the signal to one to advance was a signal to the other to stop. We are thus brought to the application of the rule by which the proposition must be tested "*was the work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?*"

The finding of the Referee is that the defendant operated an interstate railroad of which this crossing was a part and that over it passed many interstate shipments and trains. Since then the decedent was the watchman at work on this crossing charged with the duty of maintaining its safe operation, we submit that his work was so closely connected with interstate commerce as to be in legal contemplation a part of it.

While this question has not heretofore, so far as we are aware, been considered by this Court the appellant's position is sustained by high authority. The following cases will be found to be exactly in point:—

CALIFORNIA.

Rolfe was a crossing watchman on the main line of the Southern Pacific Company. At the time of the accident a

train known as the San Jose local, returning from San Francisco to San Jose, both within the State of California, approached the crossing. The watchman finding that he could not lower the gates without striking a team on the crossing, ran across the track with the intention of backing the horses away, was struck by the train and killed. An award of compensation was made to his widow under the State Compensation Law, but this award was annulled by the Court on the ground that Rolfe was employed in interstate commerce. The Court relying on the Pedersen case and quoting its language at length, concluded that since the crossing watchman's duty was to prevent collisions on the crossing, it extended to keeping the track itself free from obstructions, collisions, or interruptions.

In delivering the opinion of the Supreme Court of California, Angellotti, C. J., said:—

"The question here is, in the light of the evidence, a very narrow one, and is simply whether the principle of these decisions is applicable to one whose duties are in part to keep the track free of such obstructions to the uninterrupted passage of trains according to schedule as may be caused by passing vehicles. So far as the relation of such an employe to one attempting to cross the track is concerned, it may be conceded that there is no ingredient of interstate commerce, and that, if the only consequence to be avoided by the employment was that of injury to such a person, the Act of Congress relied on would not be applicable. But in the light of the evidence it seems to us that the scope of the employment in which deceased was engaged at the time of the accident was broader, and extended to keeping the track itself in suitable condition for use as an instrumentality of interstate commerce. In view of the evidence, the work of such a crossing gateman or flagman, so far as the railroad is concerned, is similar, in principle, to that of the track walker, whose duty it is to see that the track is in safe condition for the passage of trains, to that of the employe in the

signal tower, whose duty it is to supervise and give the signals for the passage of trains, and to that of the employe engaged in repairs on the automatic signal apparatus with which this petitioner's line is equipped. All such employes may fairly be said, it seems to us, to be directly engaged, in substantial part, at least, in keeping the track in suitable condition for use.

"There is, of course, no analogy between the case of one so engaged, and that of a train man engaged in the operation of an exclusively intrastate train. The duties of the latter are solely with reference to the operation and safety of the particular train on which he is engaged, and he has no duty whatever to perform in regard to keeping any instrumentality of interstate commerce in condition for use. Such is the full scope of his employment, and it has no relation whatever to interstate commerce, close or otherwise. The duties of deceased, as we have seen, had to do directly with the keeping of an instrumentality of interstate commerce in suitable condition for the use of such commerce. And exactly as in the case of one engaged in repairing such an instrumentality after injury thereto has occurred, who concededly is engaged in interstate commerce, it is immaterial whether or not any interstate traffic was immediately to be had over the same. The deceased was actually engaged at the moment of the accident in protecting that instrumentality from injury. His situation in this regard was, in view of the evidence, the same as it would have been if he had been one of a number of guards stationed along the line of railroad to prevent third persons from removing the rails or unlawfully placing obstructions on the track. Certainly their work would not be held to be unrelated to the safety of the track as a highway of interstate commerce. While the exact question has not been decided by the Supreme Court of the United States so far as we have found, certain language of that court in the recent case of *Texas & Pacific Ry. Co. vs. Rigsby* (decided April

17, 1916), 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874, is significant. It was said:

"The doing of plaintiff's work, and his security while doing it, cannot be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce; for a failure to set the brakes so as temporarily to hold the "bad order" cars in place on that track would have been obviously dangerous to through traffic, while an injury to the brakeman had a tendency to cause delay in clearing the main line for such traffic. Perhaps upon the mere ground of the relation of his work to the immediate safety of the main track plaintiff's right of action might be sustained."

"In the light of what has already been decided by that court, we are of the opinion that any work having for its immediate object, in whole or in part, the keeping of the track in condition for use according to schedule for interstate traffic, has such a close and direct relation to interstate transportation as to be practically a part of it, and that such work as deceased was engaged in at the time of his death was work of this character. The fact that the avoidance of injury to the public in the matter of crossing the track was also one of the objects of his employment is not material to the question before us.

"It follows that, in view of the Act of Congress relied on, the accident commission was without jurisdiction to make any award on account of the death.

"The award of the accident commission is annulled."

**Sou. Pac. Co. vs. Industrial Accident
Commission of the State of California,**
161 Pac. 1139.

The foregoing facts are susceptible of stronger presentation against the argument of this brief than can be insisted on here, for the train with which Rolfe was concerned was concededly a purely intrastate train. But in

the following decision by the same Court we have the very situation now before your Honors.

The deceased was a crossing watchman who was killed while flagging a train of undisclosed character. The only other difference worthy of note between this and the prior case is that here the tracks were not main line tracks of the Southern Pacific Company. The Court said:

"The difference is not material, in view of the further showing that the line was used indiscriminately by the petitioner in its interstate and intrastate commerce. The line was thus a part of petitioner's passenger and freight system, both interstate and intrastate, and was in constant use for both purposes. There is no material distinction between the cases. The award of the Accident Commission is annulled."

Sou. Pac. Co. vs. Industrial Accident Commission, 161 Pac. 1142.

ILLINOIS.

The decedent Clark was a flagman on a street crossing of the railroad tracks at Springfield, Ill. A city ordinance required the railroads using the crossing generally, to maintain a flagman thereon. He was employed and paid by the Chicago and Alton Railroad which was reimbursed in part by the Chicago, Peoria and St. Louis Railroad. While Clark was on duty an interstate train of the C. P. & St. L. approached the crossing and at the same time an automobile was seen coming along the highway. The flagman walked over the tracks to flag the automobile and was struck in the back by the train and was killed. There was no train of the Alton approaching at the time.

Proceedings were brought by the Administrator for compensation under the Illinois Workmen's Compensation Act (Hurd's Rev. Stat., 1917, C. 48, Sect. 126-152). The Circuit Court affirmed an award of the State Industrial Commission in favor of the administrator and a writ of error was sued out by the Railroad. The Supreme Court of

Illinois citing with approval *S. P. Co. vs. Industrial Accident Commissions*, 174 Cal. 8, 161 Pac. 1139; and *S. P. Co. vs. Industrial Accident Commission*, 174 Cal. 16, 161 Pac. 1142 (*supra*), held that Clark at the time he received the injury was engaged in interstate commerce. The Court said:—

“Deceased was employed by the Alton for the purpose of preventing collisions between pedestrians or vehicles using Sangamon Avenue and trains using the railroad tracks which crossed Sangamon Avenue. He was employed to keep the tracks clear, so that nothing would interfere with the movement of the trains of the plaintiff in error. A flagman not only protects the public from being run down by locomotives, but he likewise protects the railroad company from having its trains derailed and its equipment put into disorder by a collision with something upon its right of way. The main consideration heretofore with reference to maintaining flagmen has been the damage to the public which uses the crossing. With the coming into use of the automobile and the heavy automobile truck new considerations have arisen. A ponderous, swiftly moving locomotive, followed by a heavy train, is subjected to slight danger by a collision with a crossing pedestrian or a span of horses and a light vehicle, but when the passing vehicle is a ponderous steel structure a collision threatens not only the safety of its occupants or load, but also the safety of the passengers or freight on the colliding train. * * *

“In *Graber vs. Duluth, S. S. & A. Railway Co.*, 159 Wis. 414, 150, N. W. 489, it is said:

“If the particular act, in any substantial part, is within the interstate field, then the federal law rules the situation, if either party sees fit to stand upon legal right in the matter. * * * The law does not permit of splitting up a service, which is in its nature an entirety, into its various steps or elements. Work in the repair of a bridge, as was said, which is used

in intrastate as well as interstate business, and is indispensable to both, and in moving material to the location of the bridge for the purpose of its repair, and in moving an engine from the round-house to be used in hauling an interstate train, and work partly intrastate and partly interstate, as in preparing an engine to go out with a train made up of cars in interstate and in intrastate service, are all parts of an entirety having the efficient interstate commerce features required by the federal act. All work, so closely related to interstate commerce business as to be practically inseparable from it, though it promotes, at the same time, intrastate business, is in reality and legal effect a part of the former.'

In the instant case deceased was engaged in the maintenance of the good order of the tracks of plaintiff in error—one of the instrumentalities used by it in the transportation of goods in interstate commerce. * * *

We therefore conclude that Thomas Clark, deceased, was at the time of his injury employed in interstate commerce, and that the liability of the plaintiff in error is entirely fixed and governed by the Federal Employers' Liability Act. It follows that the Industrial Commission did not have jurisdiction of this proceeding, and the Circuit Court erred in not quashing the proceedings, record and award of the Industrial Commission.

The judgment of the Circuit Court is reversed and the cause remanded."

Chicago & A. R. Co. vs. Industrial Commission et al., 124 N. E. 344.

While it is true that an interstate train was approaching the crossing at the time of the accident, we submit that the fact in no way vitiates the decision as sustaining the petitioner's contention. The Court decides the case flatly on the ground that the crossing watchman was en-

gaged in the maintenance of the good order of the crossing tracks as an instrumentality used in the transportation of goods in interstate commerce.

Flynn was a flagman at a city crossing. On the approach of an eastbound train he crossed over the eastbound tracks to flag the crossing, and while so engaged was standing near the westbound tracks. He was struck and killed by an engine drawing an interstate train on the westbound track. The Court of Errors and Appeals of New Jersey held that Flynn, at the time of his death was engaged in an act, to use the words of the Supreme Court of the United States, directly and immediately connected with interstate business, so as substantially to form a part or necessary incident thereto. Judgment awarding compensation reversed.

Flynn vs. N. Y., S. & W. R. Co., 101 Atl. 1034.

In **Southern Railway vs. Puckett**, 244 U. S. 571, the plaintiff was engaged in assisting to raise a wrecked car from an interstate track, in order to extricate an injured employee. The Court below held:—

“That although plaintiff’s primary object may have been to rescue his fellow employee, his act nevertheless was the first step in clearing the obstruction from the tracks, to the end that the remaining cars for train No. 75 might be hauled over them; that his work facilitated interstate transportation on the railroad, and that consequently he was engaged in interstate commerce when injured.”

This Court in affirming the decision said:—

“We concur in this view. From the facts found, it is plain that the object of clearing the tracks en-

tered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce. The case is controlled by *Pedersen vs. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152; *New York Central & Hudson River R. R. Co. vs. Carr*, 238 U. S. 260, 263; *Pennsylvania Co. vs. Donat*, 239 U. S. 50; *Louisville & Nashville R. R. Co. vs. Parker*, 242 U. S. 13. *Pedersen vs. Delaware, Lackawanna & Western R. R. Co.*, *supra*, holds that a workman employed in maintaining interstate tracks in proper condition while they are in use is employed in interstate commerce; the other cases are to the effect that preparatory movements in aid of interstate transportation are a part of such commerce within the meaning of the Act."

In **Montgomery vs. Southern Pacific Company**, 131 Pac. 507, at page 511, the Court said:—

"In the business of an interstate railroad, interstate and intrastate traffic is intermingled and usually handled indiscriminately. It would be practically impossible to name any servant of an interstate road, who was employed exclusively in the furtherance of interstate traffic. *All employes who participate in the maintenance or operation of the instrumentalities for the general use of the road, thereby enhancing the utility of such commerce, are necessarily engaged in the work of interstate commerce, within the meaning of the Act.*"

In **L. & N. R. R. vs. Parker**, 242 U. S. 13, it was said:—

"The difference is marked between the mere expectation that the act done would be followed by other work of a different character, as in *Illinois Central R. R. Co. vs. Behrens*, 233 U. S. 473, 478, and doing

the act for the purpose of furthering the later work. See *New York Central & Hudson River R. R. Co. v. Carr*, 238 U. S. 260, 263; *Pennsylvania Company v. Donat*, 239 U. S. 50; *Kalem Co. v. Harper Bros.*, 222 U. S. 55, 62, 63."

Since a man wiping an insulator on a power pole bearing wires that carry current to furnish power to trains is engaged in interstate commerce (No. 118, Oct., 1919, *S. P. Co. v. Cal. Accident Commission*, not yet reported), and since, as in the case of *New York Central R. R. v. Porter*, 249 U. S. 168, a man shoveling snow alongside interstate tracks is engaged in interstate commerce, it would seem that the occupation of a man engaged in maintaining the good order of crossing tracks is equally significant.

In the case at bar the character of the crossing and tracks at Forrest Street is clearly fixed as interstate by the Referee's finding that interstate shipments and trains constantly passed over them, and we have exactly the same question as the Court passed on in the California case. A crossing watchman flagging a train of undisclosed character over a crossing and tracks used in interstate commerce. Since then the findings clearly show the interstate character of the defendant's business at that place, and, that the performance of the decedent's duty of maintenance in good order was an element in operating or conducting that business over the Forrest Street crossing, it seems plain under the decisions that his character as engaged in interstate commerce at the time he was injured is fixed.

II. Since in an action brought under the Workmen's Compensation Act of Pennsylvania, the burden is upon the claimant to prove a case within the Act, was a prima facie case made out by proof that claimant's husband was employed as a crossing watchman by a common carrier by rail and

that he was injured while engaging in the commerce conducted by the carrier over the tracks at the crossing?

The Supreme Court of Pennsylvania held that:—

"Plaintiff made out a *prima facie* case by showing, *inter alia*, the employment, work and accident in this State and the burden is on the defendant who interposed the Federal Statutes to prove facts necessary to bring the case within its terms. While a State Court can take judicial notice of an Act of Congress, it cannot take such notice of facts necessary to bring a particular case within its provisions. * * * There is no presumption that the train a watchman at a local crossing was flagging when killed was an interstate train. It is not a matter governed by presumption, but by proof (*Hench v. Penna. R. R. Co.*, 246 Pa. 1), the burden of which rests upon the party alleging it; here the defendant. This familiar rule of evidence is especially applicable here, otherwise plaintiff must prove a negative, to wit, that her husband was not killed while flagging an interstate train and must do so when the evidence as to whether it was such or not is peculiarly within the knowledge of the defendant. It was its duty to individuate the particular act in which the deceased was engaged, and show by competent evidence the train in question, and that it was an interstate train or at least that his act had some reasonably direct connection with such train (*Osborn v. Gray*, 241 U. S. 16)."

(Opinion, page 38.)

The reasoning of the Supreme Court of Pennsylvania would seem to involve a fundamental error and totally ignores the numberless decisions in State and Federal Courts upon the question of jurisdiction. Where the Court is of general jurisdiction, he who denies the jurisdiction has the burden of proof, but even in such deci-

sions, it is generally held that there is no presumption of jurisdiction where a Court, although of general jurisdiction, exercises special statutory powers in a special statutory manner or otherwise than according to the course of the common law.

On the other hand it is universally held that the exercise of jurisdiction by courts of special and limited jurisdiction does not raise a presumption of the requisite jurisdictional facts for nothing is presumed to be within the jurisdiction of such courts. One who relies upon a decision of such court, or who claims any right or benefit under its proceedings, must affirmatively show its jurisdiction in the premises by alleging and proving the same.

The Workmen's Compensation tribunals exercise special statutory powers in a special statutory manner and in contravention of the common law. They are also bodies exercising a special and limited jurisdiction otherwise than according to the course of the common law.

In the case of **New York Central Railroad vs. White**, 243 U. S. 188, which was an appeal challenging the constitutionality of the New York Workmen's Compensation Act, Mr. Justice Pitney said, "The scheme of the Act is so wide a departure from common law standards respecting the responsibility of employer to employee, that doubts naturally have been raised respecting its constitutional validity."

And in **Southern Pacific Co. vs. Jensen**, 244 U. S. 205, an appeal from the same State, Mr. Justice McReynolds, delivering the opinion of the court, said, "The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction."

The law in Pennsylvania affords a choice of two remedies to injured railroad employees; one under the Federal, the other under the State law. Where the Federal

statute is pleaded and its applicability is denied by the answer, the plaintiff must prove his allegation of interstate employment before he can put the defendant to any proof at all.

The case of *Hench v. P. R. R.*, 246 Pa. 1, relied on by the Supreme Court of Pennsylvania in its opinion, asserts this rule and holds that where "the facts proved did not show what kind of commerce the decedent was engaged in at the time of the accident there is no more presumption that it was interstate than intrastate commerce, if indeed, it can be said there is any presumption at all under the circumstances. The burden was on the plaintiff to prove facts to show that her husband was engaged in interstate commerce at the time he received his injuries and as to these essential facts the proofs failed to make out a *prima facie* case."

This is undoubtedly the correct rule and hence it would seem to follow necessarily, that where the jurisdiction of the State Compensation tribunals is denied by the answer the claimant must make the like proof. This was the result reached by the highest court in New Jersey in a proceeding brought under the Compensation law of that State.

In *Lincks vs. Erie R. R. Co.*, 91 New Jersey Law 166, 169, it was held:—

"The fundamental question to be now decided, therefore, is whether the engine upon which the decedent had just finished his work, or that upon which he was about to commence his work, was either of them, intended to be presently used in interstate or in intrastate commerce. If, in the former, the carrier's liability is to be determined solely under the federal statute; if in the latter, then the state statute applies. As we have already pointed out, there is absolutely no testimony whatever upon this vital point. This being so, neither the judgment of the Common Pleas nor that of the Supreme Court has any foundation of fact upon which to rest. The burden was upon the petitioner in the court of the

first instance to prove a case within the state statute—that is, to show, affirmatively, that the plaintiff's decedent was engaged in a service which was not regulated by the federal statute, for that fact is not to be presumed in the absence of proof."

In *Osborne v. Gray*, 241 U. S. 16, relied on by the Supreme Court of Pennsylvania, the plaintiff was before a State Court of general jurisdiction and proved a case of negligence under the State law. The applicability of the Federal Employers' Liability Act was urged by the defendant and was finally denied by this Court on the ground that the defendant having cognizance of the facts had failed to prove anything to bring the case within the Federal law.

The reliance below upon this and other cases would seem to indicate a persistent refusal to meet the question raised. The petitioner did not and does not contend, as stated by the courts below, that the burden is on the claimant to prove a negative. It asks no more than that when the issue is raised upon petition and answer the claimant shall prove the jurisdictional facts, the essential requirement here being proof of facts, from which an engaging in intrastate commerce may be inferred. At the very least the defendant cannot be called upon for proof that the particular train was an interstate train when the claimant fails to show what train it was.

There may be, on grounds of public policy, strong reason for placing on a defendant railroad company, under certain circumstances, the burden of proving facts peculiarly within its knowledge. But although the Supreme Court of Pennsylvania places its decision on this ground the decision goes far beyond any such reason. For here the essential fact is not within the railroad company's knowledge. The claimant rests with proof that her decedent was flagging a train (which may have been either an inter or an intrastate train) at an hour when there was a great volume of traffic over the defendant's main artery of travel. There is nothing to show whether the train was going north or

south, whether it was a passenger, freight or coal train, or any other fact which would enable the defendant to identify it and ascertain its character. On this vital point the claimant is absolutely silent, and the ruling of the Supreme Court of Pennsylvania imposes on the defendant a burden impossible to be borne. The defendant might show for instance a movement of one intrastate and nineteen interstate trains about the time of the accident, to be met with the perfectly valid objection that there is no proof as to which train was approaching and no presumption that decedent was not flagging the intrastate train. We submit there is no rule or presumption of law that can be invoked to impose so heavy a burden upon the defendant.

This is not like *Osborne vs. Gray*, a case where the Court has the requisite jurisdiction and where the only question is whether the provisions of a Federal or State Statute should be applied. The Compensation tribunals have not jurisdiction unless the parties are engaged in intrastate commerce. It is this distinction, which the Supreme Court of Pennsylvania failed to grasp but which clearly appears in the decision of the Court of Errors and Appeals of New Jersey in *Lincks vs. Erie RR.* (*supra*).

The distinction, however, has been recognized by the Pennsylvania Courts and the situation here presented is essentially the same as in any case where the State law must defer to the paramount authority of an Act of Congress.

On June 4, 1901, the legislature of Pennsylvania passed an Act entitled an Act relating to Insolvency, etc., P. L. 404. This established a complete system for the settling of insolvent estates in the State of Pennsylvania. Some years before, however, Congress had passed a general law in relation to bankruptcies, Act of July 1, 1898, Chapter 541, entitled an Act to establish a uniform system of bankruptcy throughout the United States. It provided, Chapter 3, Sect. 4 (b) that any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, may be adjudged an involuntary bankrupt. It was not long before a question arose requiring determination by the Courts of this State.

An assignee for the benefit of creditors petitioned the Court to set aside a writ of execution, in accordance with the 16th Section of the Act of June 4, 1901, on the ground that the assignor was a farmer and therefore not within the provisions of the Federal Bankrupt Act. Now under the theory as to the burden of proof now laid down by the Supreme Court of Pennsylvania, the petitioner having pleaded a case within the State Insolvency Act, was entitled to the benefit of that Act unless the defendant should exclude him and put him under the Federal law by proving that he was not a farmer. As to that contention the Court said:—

"Wage earners and persons engaged chiefly in farming or the tillage of the soil cannot be subjected to the provisions of that Act (*i. e.*, the Federal Bankrupt Law) without their consent and as to such persons the Act of June 4, 1901, P. L. 404, is in force. This statute is only suspended as to persons who can be made subject to the provisions of the Federal Bankrupt Act. * * * True the assignee alleged in his petition that the defendant, the assignor, was a farmer, but this was explicitly and unequivocally denied by the answer. The undisputed facts of the case set forth in the petition and answer neither give rise to, nor permit a presumption of fact that at the time of the assignment the assignor belonged to that class of persons excepted from the provisions of the bankruptcy act. As to that question the petitioner assumed the affirmative, as we think he was bound to do, and alleged in his petition the fact necessary to bring the case within the exception to the general rule established by the Act of Congress, but as this allegation was denied in the answer, it was incumbent on him to follow it by proof."

Charles vs. Smith, 29 Pa. Superior Ct. 594.

The striking and true analogy here presented is manifest. Argument can neither aid nor obscure it. The State legislation is suspended as to all except those persons not included in the Federal law. In the one case farmers, in the

other intrastate railroad employees may claim the benefits of the State law, but when their status is denied they must prove it.

The effect in the case at bar of the ruling of the State Court as to the burden of proof is to deprive defendants of the right to the protection of the Federal Act. If the jurisdiction of the Compensation tribunals is to be presumed, any claimant may bring a proceeding under the Compensation law and by vague and inconclusive testimony effectually preclude the possibility of a defense.

It would seem from the following decisions that it is not within the powers of the State Court to lay down as a matter of mere State procedure a rule governing the burden of proof in cases involving a Federal right.

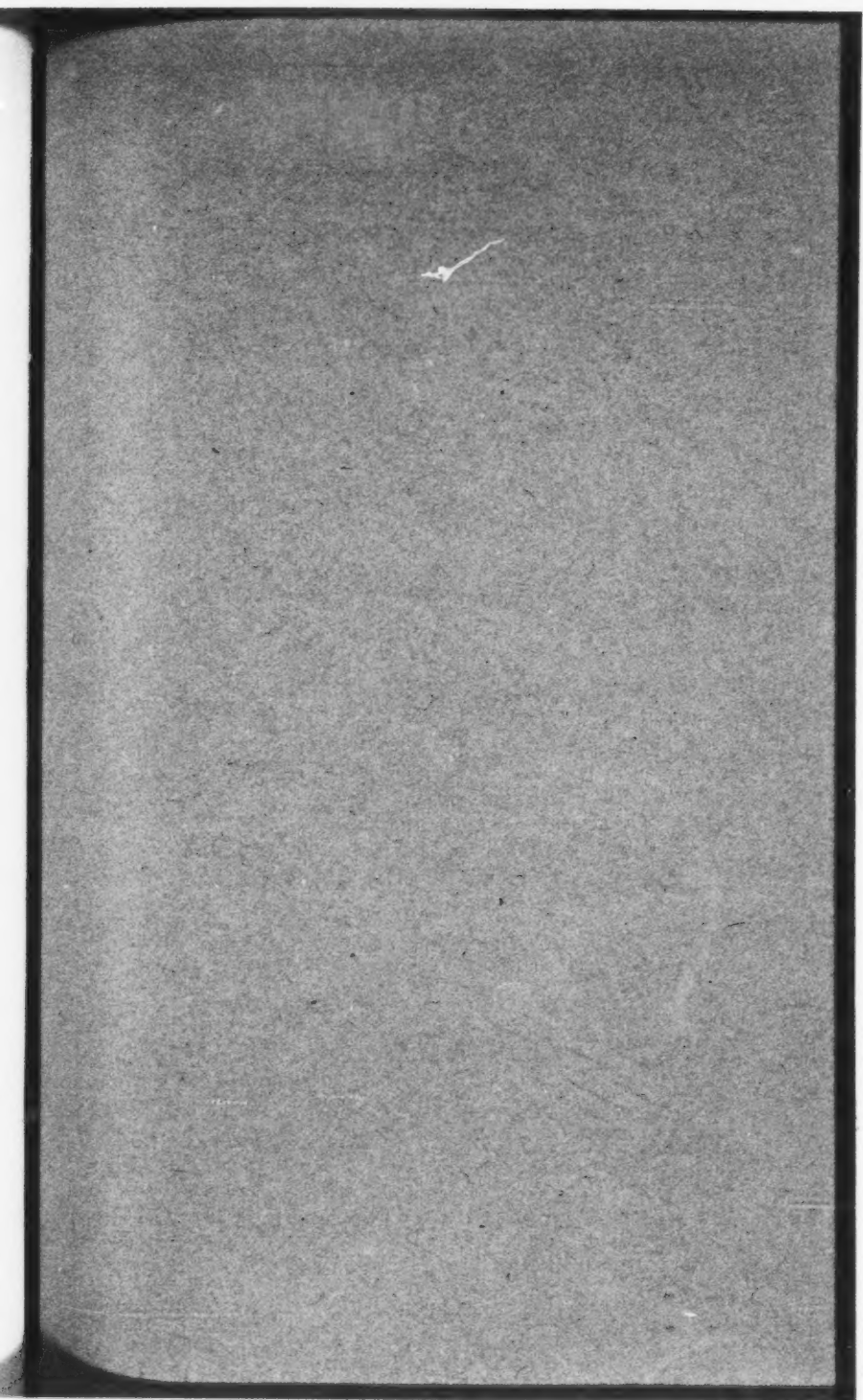
In **Central Vermont Ry. Co. vs. White**, 238 U. S. 507, this Court held that in an action under the Employers' Liability Act the burden of proof as to whether the employee was guilty of contributory negligence is a matter of substance and not of mere State procedure.

In **New Orleans & North Eastern R. R. vs. Harris**, 247 U. S. 367, the so-called "*Prima Facie* Act" of Mississippi was involved. That Act provided that in any actions against railroads for damages, proof of injury inflicted by an engine propelled by steam shall be *prima facie* evidence of negligence. Since negligence is held to be essential to recovery under the Federal Act this Court held that the question of burden of proof is a matter of substance and not subject to control by laws of the several states.

In **Lee vs. Central of Georgia Ry.** (No. 150, October 1919, not yet reported). This Court relying on the cases just cited held that when matters nominally of procedure are actually matter of substance which affect a Federal right, that the decision of the State Court therein becomes subject to review by this Court.

It is respectfully submitted that the writ of *certiorari* be granted as prayed for.

GEORGE GOWEN PARRY,
Counsel for Petitioner.



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IN THE SUPREME COURT OF PENNSYLVANIA.

January Term, 1920.

Maria Domenica Di Donato,
Plaintiff,

vs.

*Philadelphia and Reading Rail-
way Company, Defendant.*

Appeal of Defendant.
No. 2020 December Term 1918
from the judgment.

Appeal from Court of Common
Pleas No. 1 of the County of
Philadelphia.

Filed March 13, 1919.

Eo die. Certiorari exit.

Retble. first Monday January 1920.

March 18, 1919. Record returned
& filed.

December 24, 1919. Assignments
of Error filed.

January 14, 1920. Argued.

February 23, 1920. The judgment
is affirmed. Opinion by Wall-
ing, J.

March 2, 1920. Petition of appel-
land to stay the mandate pend-
ing application to the Supreme
Court of the United States for
writ of *certiorari*, filed.

March 8, 1920. Petition denied.
Per Curiam.

March 9, 1920. Petition to stay
mandate pending application to
Supreme Court of United States
for Writ of *Certiorari*, filed.

And now, to wit this 9th day of
March, A. D. 1920, upon consid-
eration of the foregoing petition
and upon motion of George
Gowen Parry, Esq., Counsel for
Philadelphia and Reading Rwy.
Company Appellant, it is or-
dered that the mandate in the
above entitled case shall not is-
sue but shall be stayed until
April 5, 1920, and that if on or
before that day there shall be
filed with the Prothonotary of
this Court an affidavit of Coun-
sel for Philadelphia and Read-
ing Railway Company showing
that a petition for writ of *cer-
tiorari* has been filed by the said
appellant in the Supreme Court
of the United States that the
mandate shall be held for a fur-
ther period thereafter and shall
not issue before final disposition
shall be made by the Supreme
Court of the United States of
the petition for the writ of *cer-
tiorari* aforesaid.

J. HAY BROWN,
Chief Justice.

OPINION.

IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN
DISTRICT.

January Term, 1920. No. 12.

Maria Domenica Di Donato

vs.

Philadelphia and Reading Railway Company.

Appeal by Defendant from the Judgment of the Court of
Common Pleas, No. 1, of Philadelphia County.

Filed February 23, 1920.

WALLING, J.

This case is under the State Workmen's Compensation Act. On March 18, 1918, Pasquale Di Donato, while in defendant's employ as a watchman at a public road crossing in this state, was killed by a train on tracks used for both intra and interstate commerce, and it does not appear to which branch of the service that train, or the one he was flagging, belonged. The referee made an award in favor of his widow; from which defendant appealed to the compensation board and later to the court below; and, the board and the court having affirmed the award, brought this appeal.

In our opinion the case was properly decided. However, if the deceased lost his life while employed in interstate commerce, the case is within the Federal Employer's Liability Act of 1908, and there can be no recovery here (*Railroad Company vs. Winfield*, 244 U. S. 170, and 147), and the flagging of an interstate train is in such commerce; *Flynn vs. N. Y. S. & W. R. Co. (N. J.)*, 101 Atl. 1034. But we cannot adopt defendant's contention that a watchman at such crossing is engaged in interstate commerce

when flagging an intrastate train. The nature of the employment is determined by the work in hand at the immediate time of the accident (*Erie Railroad Company vs. Welsh*, 242 U. S. 303; *Minneapolis & St. Louis R. R. Co. vs. Winters*, 242 U. S. 353, 357; *Myers vs. Union R. R. Co.*, 256 Pa. 474), and, as such work often shifts rapidly from one class of employment to the other, each case must be decided in the light of its particular facts (*N. Y. Central R. R. Co. vs. Carr*, 238 U. S. 260), and is governed by the purpose of the operation: *Louisville & Nashville R. R. Co. vs. Parker*, 242 U. S. 13. If the work in hand is interstate, or so closely related thereto as to be practically a part of it, then it falls within the Act of Congress (*N. Y. C. & H. R. R. Co. vs. Carr*, *supra*), as it also does where the work has a direct application to both intra and interstate commerce (*Erie R. R. Co. vs. Winfield*, *supra*); for example, keeping a track used for both in repair (*Pedersen vs. Del., Lack. & West. R. R.*, 244 U. S. 146 *Zikos vs. Oregon R. & Navigation Co.*, 179 Fed. 893) and free from obstructions (*So. Ry. Co. vs. Puckett*, 244 U. S. 571; *Cent. R. R. of N. J. vs. Colasurdo*, 192 Fed. 901). But a crossing flagman is in the nature of a traffic officer who protects the public and pilots each train over the crossing; and how can it be said that he is engaged in through traffic when so conducting a local train? He is assisting that train and his act is not essentially different from that of a conductor or brakeman thereon, for each is working for the safety of the train. Yet an employee upon an intrastate train is not engaged in interstate commerce: *Ill. Cent. R. R. vs. Behrens*, 233 U. S. 473. However, it is urged that flagging a local train promotes its safe passage and thus tends to keep the track open and clear for through traffic; but certainly no more so than the work of the crew of the intrastate train on the same track, and if this incidental matter of keeping the track open renders the one an interstate employment, why not both? The repair of a track or bridge over which interstate commerce passes is a direct immediate benefit thereto, entirely unlike any remote or collateral benefit it might possibly derive from flag-

ging an intrastate train. And the true rule apparently is that to come within the range of interstate commerce the work must bear directly and not remotely thereon; otherwise practically all local work on trunk railways would be in interstate commerce, for one can scarcely conceive of any act so done that might not have some remote bearing upon such commerce. So, while this question does not seem to have been directly decided by the United States Supreme Court and the rulings thereon by other Courts are not in harmony, we conclude that a crossing watchman while flagging an intrastate train is not employed in interstate commerce, although trains engaged in such commerce use the same tracks.

Plaintiff made out a *prima facie* case by showing, *inter alia*, the employment, work and accident in this state, and the burden is on defendant, who interposed the Federal statute, to prove facts necessary to bring the case within its terms. While a state court can take judicial notice of an act of congress it cannot take such notice of facts necessary to bring a particular case within its provisions. The Federal Employer's Liability Act, applicable to interstate commerce only, bears no analogy to the Federal Bankruptcy Act, which is of general application. There is no presumption that the train a watchman at a local crossing was flagging when killed was an interstate train. It is not a matter governed by presumption but by proof (*Hench v. Penna. R. R. Co.*, 246 Pa. 1, 6; and See *Hancock v. Phil. & R. Ry. Co.*, 264 Pa. 220), the burden of which rests upon the party alleging it; here the defendant; *Polk v. Philadelphia & R. Ry. Co.*, 000 Pa. 000 (filed this term). This familiar rule of evidence is especially applicable here, otherwise plaintiff must prove a negative, to-wit, that her husband was not killed while flagging an interstate train, and must do so when the evidence as to whether it was such or not is peculiarly within the knowledge of defendant. As the latter offered no evidence upon the question that defense failed. It was its duty to individuate the particular act in which the deceased was engaged and show by competent evidence the train in question and that it was an interstate

train, or at least that his act had some reasonably direct connection with such train. In *Osborne v. s. Gray*, 241 U. S. 16, the Court, speaking through Mr. Justice Hughes, say (page 21): "It is apparent that there was no evidence requiring the conclusion that the deceased was engaged in interstate commerce at the time of his injury, and we are asked to supply the deficiency by taking judicial notice that the cars came from without the State. This contention we are unable to sustain. The make-up of trains and the movement of cars are not matters which we may assume to know without evidence. * * * The defendants knew the actual movement of the cars, and failing to inform the court upon this point cannot complain that they have been deprived of a Federal right."

The judgment is affirmed.

REFEREE'S AWARD OF COMPENSATION.

Claim Petition No. 5619.

Maria Domenica DiDonato, Claimant,

vs.

Philadelphia and Reading Railway Company, Defendant.

Hearing held at No. 1115 North American Building, Philadelphia, Penna., on Tuesday, June 11th, 1918, at 10 A. M., at which there were present:—

Mrs. Maria Domenica DiDonato, 126 Maple Street, Conshohocken, Penna., claimant; Hymen Shane, Esq., appearing for Roland C. Evans, Esq., 1218 Chestnut Street, Philadelphia, Penna., counsel for claimant; Frank Ruggiero, Conshohocken, Penna., interpreter; Joseph Stanislawski, 1115 Maple Street, Conshohocken, Penna., witness for claimant; and

George Gowen Parry, Esq., counsel for defendant; Herbert M. Snook, 4528 North Nineteenth Street, Philadelphia,

Penna.: J. L. Long, 48 Fayette Street, Conshohocken, Penna., and George M. Wilde, 121 East Main Street, Lansdale, Penna., witnesses for defendant.

FINDINGS OF FACT.

At the hearing, it was agreed that the claim petition should be amended so as to name the defendant as the Philadelphia and Reading Railway Company instead of the Philadelphia and Reading Railroad Company.

On March 18th, 1918, neither Pasquale DiDonato nor the defendant had filed with the Workmen's Compensation Bureau, nor served upon the other, notice of rejection of Article III of the Workmen's Compensation Act of 1915, in accordance with the provisions of said Act.

On that date and for some time previous thereto, Pasquale DiDonato was in the employ of the defendant, whose business was that of steam railway operator and whose place of business was at Philadelphia, Penna., as a crossing watchman, at the Forrest Street crossing in Conshohocken, Penna., and in said employment on that date his wages were payable on an hourly basis, and during so much of the six months previous thereto as he worked for the defendant his average weekly wage was Sixteen dollars and fifty cents (\$16.50) and was payable semi-monthly.

On that date at about 7.15 P. M., Pasquale DiDonato, while acting in the course of his employment with the defendant, while flagging a train at the Forrest Street crossing in Conshohocken, Penna., was struck by a train of the defendant company and instantly killed.

It was contended by the defendant that at the time of the occurrence of the injury, Pasquale DiDonato was engaged in interstate commerce. The defendant, however, failed to prove by the weight of the evidence that such was the fact. The defendant showed that many interstate shipments and trains passed over the rails of the defendant company at this Forrest Street crossing, but they did not offer any evidence whatever to show that at the time of the occurrence of the injury Pasquale DiDonato was engaged

in performing some duty incident to the passage of an interstate train; and since the burden is on the defendant to show by the weight of the evidence that the injured employee was at the time of the occurrence of the injury engaged in interstate commerce, we find, as a fact, that at the time of the occurrence of the injury Pasquale DiDonato was not engaged in work incident to interstate commerce.

The defendant had due notice of the injury and of the death of Pasquale DiDonato, and that his death had occurred as aforesaid.

At the time of the occurrence of the injury, the defendant was a common carrier, by rail, engaged in both intrastate and interstate commerce.

The expense of the burial of the decedent exceeded One Hundred Dollars, none of which has been paid by the defendant, and he left to survive him the following dependents:—

His widow—Maria Domenica DiDonato, who resided with him at the time of his death, and the following children:—

Nicola DiDonato, born January 18, 1907.

Rosa DiDonato, born April 29th, 1912.

Vincezo DiDonato, born January 3rd, 1915.

Amedio DiDonato, born January 20th, 1917.

CONCLUSIONS OF LAW.

On March 18th, 1918, both Pasquale DiDonato and the defendant were bound by the terms of Article III of the Workmen's Compensation Act of 1915.

The injury sustained by Pasquale DiDonato while acting in the course of his employment with the defendant on that date was such an injury by accident as is contemplated by Article III, Section 301, of said Act; and since these injuries resulted in the death of Pasquale DiDonato, and the defendant had due notice of the occurrence of the injury and of the death of Pasquale DiDonato, and that his death had so resulted; and since he left to survive him

a dependent widow and children, his deponents are entitled to compensation.

AWARD.

Under Article III, Section 307, compensation is awarded as follows:—

To Maria Domenica DiDonato, One Hundred Dollars (\$100.00) on account of the expense of burial of decedent; and Sixty per cent. (60%) of decedent's weekly wage of sixteen Dollars and Fifty Cents (\$16.50) or Nine Dollars and Ninety Cents (\$9.90) per week, from March 18, 1918, to January 17th, 1923, inclusive;

To Maria Domenica DiDonato, fifty-five per cent. (55%) of decedent's weekly wage of sixteen dollars and fifty cents (\$16.50) or Nine Dollars and eight cents (\$9.08) per week from January 18th, 1923 to December 17th, 1923, inclusive;

To the Guardian of Roca, Vincenzo and Amedio DiDonato, Thirty-five per cent. (35%) of decedent's weekly wage of Sixteen Dollars and Fifty Cents (\$16.50) or five dollars and seventy-eight (\$5.78) per week from December 18th, 1923, to April 28th, 1923, inclusive.

To the Guardian of Vincenzo and Amedio DiDonato, Twenty-five per cent. (25%) of decedent's weekly wage of Sixteen Dollars and Fifty Cents (\$16.50) or Four Dollars and Thirteen Cents (\$4.13) per week, from April 29th, 1928, to January 2nd, 1931.

To the guardian of Amedio DiDonato, Fifteen Per cent. (15%) of decedent's weekly wage of Sixteen Dollars and Fifty Cents (\$16.50) or Two Dollars and Forty-eight Cents (\$2.48) per week, from January 3rd, 1931, to January 19th, 1933, inclusive.

(Signed) GEO. C. KLAUDER,

Referee, First District.

PITTLAR, PENNA., July 27th, 1918.

OPINION OF THE WORKMEN'S COMPENSATION BOARD.

MACKAY, Chairman:—The claimant in the above entitled case is the widow of Pasquale DiDonato who was killed in the course of his employment for the defendant, The Philadelphia & Reading Railway Co., under the following circumstances: On March 18th, 1918, the deceased was employed as a watchman upon a public crossing where Forest Street, a public highway, in Conshohocken, Pa., crosses the tracks of the defendant. An agreement was placed upon the record that the defendant is engaged in both intrastate and interstate traffic. The defendant contends that under these facts the deceased at the time of his death was engaged in interstate commerce and that the Workmen's Compensation Board has no jurisdiction to award compensation. Of course, if the deceased were engaged in interstate commerce at the time of his death, the defendant would be relieved of the obligation to pay compensation. *New York Central R. R. v. Winfield*, 244 U. S. 174.

The record discloses that in the case at bar we have a watchman whose duties were to guard a public crossing of a railroad company's tracks over which at different intervals passed trains containing interstate commerce and at other times trains with shipments solely confined to points within the state. The defendant is striving to establish the proposition that, under such circumstances, this watchman is a part of the essential machinery of the operation of its interstate commerce, and therefore at all times, no matter what be the character of the trains that pass over the tracks, is engaged in interstate commerce. It is true that we have held in *Petrollini v. Phila. & Reading Railway Co.*, 3 Department Reports 2862, that "the flagging of an interstate train at a crossing is as essential to the security, expedition and efficiency of interstate commerce as is the repairing of a bridge; nor can we distinguish between the employment of a crossing ten-

der while flagging an interstate train from that of a flagman who is a member of a crew of an interstate train who is set out to perform a similar service," yet in *McAndrews vs. Delaware, Lackawanna & Western Railroad Co.*, 3 Department Reports, 2863, we held that "the watchman's services in signaling intrastate trains, while essential to keeping such trains in motion and so to keeping the tracks clear for the passage of interstate trains, is not more, but rather less essential to such purposes than are the services of the train crew upon an intrastate train, which have been repeatedly held to be intrastate and not interstate commerce. Therefore, the mere fact that the flagman's services are valuable in keeping the track clear for interstate commerce cannot make his employment interstate in character. It may, however, be contended that the security of interstate commerce, both passenger and freight, requires that the track be guarded against outside intrusion by those using the highway at times when the track is in use for the transportation of interstate passengers and freight, and that therefore, the services of the watchman are essential to the security of such commerce in the same manner, though perhaps not to the same extent, as are the services of section hands, who keep the track in repair. There is, however, a marked difference between the laying out of permanent tracks and the performance of duties, from time to time, which only conduce to the security of interstate commerce, and as these services are from time to time required."

If these observations are well founded and the distinction that we attempted to draw in these two cases is logical, then the Referee must be affirmed. The defendant set up interstate commerce as a defense and upon that suggestion challenged the jurisdiction of the Workmen's Compensation Board, and if it is essential to establish that defense by showing the character of the train which the flagman was signalling and which caused his death, then the defense has failed, for the Referee has rightly concluded that there was no evidence before him indicating whether or

not the train that caused the death, which was the same train which the deceased was flagging, was an interstate or intrastate vehicle, but if the contention of the defendant is well founded in law that a watchman at a public crossing of a railroad company over which at times passes interstate as well as intrastate freight is always an employee engaged in interstate commerce, then the Referee was wrong and his legal conclusion from these facts is erroneous and should be reversed and compensation ought to be disallowed.

We have just decided in *Smith v. Philadelphia & Reading Railway Co.*, in an opinion handed down at the same time with the one now under discussion, that when a watchman is killed while in the act of flagging an interstate train he is engaged in interstate commerce and a state compensation law is not applicable.

We hold, however, that the defense of interstate commerce when set up by the defendant becomes a matter of proof by competent and reliable testimony and that the burden of the same is thrown upon the defendant. This proposition we assume is beyond successful controversy. See *Osborn v. Gray*, 241 U. S. 16; *Hench v. Pennsylvania Railroad Co.*, 246 Pa. 1. In this case the defendant alleges that there was nothing for it to meet, inasmuch as it was content to rest its case upon the legal proposition just above outlined. We believe the best considered decisions indicate that the courts unite upon the thought, that the character of the employee's undertaking in this respect must be determined by the work he had actually been engaged in at the very time of the accident. See *Hench v. Pennsylvania Railroad Co.* (*supra*); *Railroad Company v. Behrens*, 246 U. S. 473; *Chicago, etc., v. Harrington*, 241 U. S. 177; *Mayers v. Railroad Co.*, 256 Pa. 474; *Minneapolis, etc., v. Winters*, 242 U. S. 353. We have consistently adhered to this line of decisions. See also *McLaughlin v. Lehigh Valley Railroad Co.*, 4 Department Reports 224.

We hold, therefore, that this watchman while in the

course of his employment met his death while flagging a train whose character has been undisclosed by the testimony. We believe that the mere fact that he was so engaged does not render him an employee engaged in an interstate activity. We rule that the burden of proving its defense was upon the defendant and sustain the Referee in his finding that this burden has not been met.

We hold that there is a clear line of distinction between the case of Amy Smith vs. Phila. & Reading Railway Co., just decided and the present one. We disallowed compensation in the former case on the ground that the deceased was actually flagging an interstate commerce train at the time of his death. In the latter, under the proofs, we have an employee performing his duties for an employer and suffering death in the course of that employment with the facts undisclosed by the testimony as to whether he was engaged in an interstate or intrastate activity at that time. The claimant, therefore, established a *prima facie* case entitling her to compensation which has not been overcome by any proof whatsoever.

The award of the Referee is accordingly affirmed and the appeal dismissed.

HARRY A. MACKEY,

Chairman.

Concurred in by Commissioners Scott and Leech.
DECEMBER 13, 1918.

MAR 21 1921

JAMES D. MAHER,
CLERK

No. 297.

OCTOBER TERM, 1920.

IN THE
Supreme Court of the United States

PHILADELPHIA AND READING RAILWAY COMPANY,
Petitioner,

vs.

MARIA DOMENICA DiDONATO, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA.

BRIEF FOR PETITIONER.

GEORGE GOWEN PARRY,

Counsel for Petitioner.
415 READING TERMINAL,
PHILADELPHIA, PA.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. 297.

Philadelphia and Reading Railway Company, Petitioner,

VS.

Maria Domenica DiDonato, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
COMMONWEALTH OF PENNSYLVANIA.

STATEMENT OF THE CASE.

This case comes before the Court on a writ of *certiorari* issued to the Supreme Court of the Commonwealth of Pennsylvania, to review a judgment of that Court affirming a judgment of the Court of Common Pleas No. 1 of Philadelphia County, Pennsylvania, which affirmed an award of the Workmen's Compensation Board of the Commonwealth of Pennsylvania. The questions involved may be stated as follows:—

I. IS A WATCHMAN EMPLOYED ON AN INTERSTATE RAILROAD, AT A GRADE CROSSING OVER WHICH INTERSTATE SHIPMENTS AND TRAINS CONSTANTLY PASS, ENGAGED IN INTERSTATE COMMERCE WHILE PERFORMING HIS DUTIES IN FLAGGING TRAINS OVER THE CROSSING?

II. SINCE IN AN ACTION BROUGHT UNDER THE WORKMEN'S COMPENSATION ACT OF PENNSYLVANIA, THE BURDEN IS UPON THE CLAIMANT TO PROVE A CASE WITHIN THE ACT, WAS A PRIMA FACIE CASE MADE OUT BY PROOF THAT CLAIMANT'S HUSBAND WAS EMPLOYED AS A CROSSING WATCHMAN BY A COMMON CARRIER BY RAIL AND THAT HE WAS INJURED WHILE ENGAGING IN THE COMMERCE CONDUCTED BY THE CARRIER OVER THE TRACKS AT THE CROSSING?

The record shows that Maria DiDonato filed a petition under the Workmen's Compensation Act of Pennsylvania to recover compensation for the death of her husband, a crossing watchman employed by the defendant at the grade crossing formed by the intersection of the main line of its Railroad with Forrest Street, in the Borough of Conshohocken, Pennsylvania. This crossing was protected by safety gates operated by the watchman, who was also provided with lanterns, flags and a signal disc for signalling purposes.

The Compensation Referee found that, while acting in the course of his employment in flagging a train over this crossing, Donato was struck by another train and instantly killed; that interstate shipments and trains constantly pass over the tracks of the crossing but that there was no proof as to the character of the particular train which the decedent was flagging when he was killed.

Upon these findings an award of compensation was made by the Referee, which was affirmed by the Compensation Board, whose decree was affirmed by the judgment of the Court of Common Pleas. From this judgment the petitioner appealed to the Supreme Court of Pennsylvania, which dismissed the appeal and affirmed the judgment of the Court of Common Pleas in favor of the respondent. A petition for a writ of *certiorari* was filed in this Court and allowed.

SPECIFICATIONS OF ERROR.

I. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas No. 1, of Philadelphia County, Pennsylvania, for the respondent, whereby the petitioner was denied the right, privilege and immunity claimed by it under the Act of Congress of April 22, 1908, C. 149, 35 Stat. 65, commonly called the Federal Employers' Liability Act.

II. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas No. 1 of Philadelphia County, Pennsylvania, for the respondent on the ground "that a crossing watchman while flagging an intrastate train is not employed in interstate commerce, although trains engaged in such commerce use the same tracks" (opinion Record page 35) for there is no finding that the crossing watchman was flagging an intrastate train.

III. The Supreme Court of Pennsylvania erred in holding that "Plaintiff made out a *prima facie* case by showing, *inter alia*, the employment, work and accident in this state, and the burden is on defendant, who interposed the Federal Statute, to prove facts necessary to bring the case within its terms." (Opinion Record page 35).

IV. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court below in favor of the respondent because by that decision it affirmed the award of the Workmen's Compensation Board, based upon a finding that the decedent was not engaged in interstate commerce, which finding was contrary to the evidence.

V. The Supreme Court of Pennsylvania erred in refusing to reverse the judgment of the Court below, and in refusing to enter judgment for the petitioner because the findings of fact showed that the decedent was engaged in interstate commerce at the time of the accident and therefore his dependents were not entitled to an award under the Workmen's Compensation Act of Pennsylvania.

BRIEF OF ARGUMENT.

The questions involved in this case are of great importance not only to interstate carriers by railroad, and the employees of such carriers engaged in interstate commerce, but to those persons engaged in the trial of cases under the Federal Employers' Liability Act, and the Workmen's Compensation Act of Pennsylvania.

These questions are:—

I. Is a watchman employed on an interstate railroad, at a grade crossing over which interstate shipments and trains constantly pass, engaged in interstate commerce while performing his duties in flagging trains over the crossing?

II. Since in an action brought under the Workmen's Compensation Act of Pennsylvania, the burden is upon the claimant to prove a case within the Act, was a prima facie case made out by proof that claimant's husband was employed as a crossing watchman by a common carrier by rail and that he was injured while engaging in the commerce conducted by the carrier over the tracks at the crossing?

The first question involved in this argument is raised by the findings of the Compensation Referee, which while meagre, establish that claimant's decedent was employed by the defendant as a crossing watchman at its Forrest Street Crossing, Conshohocken, that while engaged in flagging a train he was killed; that many interstate trains pass over this crossing, and that the defendant is a common carrier by rail engaged in interstate commerce (Referee's Award, Record pages 12, 13).

With these facts as a basis the Referee awarded compensation and the award was affirmed by the Compensation Board in an opinion, apparently based on a theory which does not seem to be in concord with the Federal law, and this decision was affirmed by the Court of Common Pleas and the Supreme Court of Pennsylvania.

Questions of classification of employment in or outside of interstate commerce are no doubt difficult enough, for it is well nigh impossible to formulate a rule of much practical assistance applicable to the almost endless diversity of circumstances arising in daily modern life. However, the application of the principle must be made to particular facts as they arise and the rule laid down by this Court by which the facts are to be tested is: "*Was the work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be part of it?*"

In **Pedersen vs. Delaware &c., Ry.**, 229 U. S. 146. An employee of an interstate railway carrier was killed while carrying a sack of rivets to be used on the morrow in repairing a bridge over which regularly passed both kinds of commerce, and although he was killed by a train operating wholly within the State where the accident happened, it was held by this Court that the case came within the Federal Act, because the bridge to be repaired was habitually used in interstate commerce as well as the other kind.

"Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. * * * The work of keeping such instrumentalities in a proper state of repair, while thus used, is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: 'Is the work in question a part of the interstate commerce in which the carrier is engaged?' True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used, it

is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

It will scarcely be controverted that a watchman is stationed at a grade crossing for the single purpose of protecting the crossing tracks from the dangers of collision between traffic on the railroad, and traffic on the highway.

Now a crossing is just as much a part of an interstate highway as a bridge and the protection of the one as much a part of interstate commerce as the protection of the other. Repairs to, or the maintenance of, either fall in the same category. True the case at bar differs slightly from *Pedersen* in its facts, though not in principle, for that was a case of repair, and this of protection. But can it be doubted that the operator of, or the signaller on, a drawbridge on an interstate railroad takes an interstate character from his employment? Yet if the learned Court below is not in error the conclusion is compelled that the man on the bridge is alternately impressed with the character of each approaching train. The fallacy of this reasoning lies in treating a mere incident of the employment as the controlling factor. What was the nature of the work the man was employed to do and was doing? The answer is clear, to protect the crossing by keeping it clear for traffic either on the railroad or highway. As a necessary incident of his work he was flagging a train and since he was acting in the course of his employment he was also necessarily engaged at the same moment in closing the public highway to vehicles and pedestrians, for the signal to one to advance was a signal to the other to stop. We are thus brought to the application of the rule by which the proposition must be tested "*was the work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?*"

The finding of the Referee is that the defendant operated an interstate railroad of which this crossing was a part and that over it passed many interstate shipments and trains. Since then the decedent was the watchman at work on this crossing charged with the duty of maintaining its safe operation, we submit that his work was so closely connected with interstate commerce as to be in legal contemplation a part of it.

While this question has not heretofore, so far as we are aware, been considered by this Court the appellant's position is sustained by high authority. The following cases will be found to be exactly in point:—

CALIFORNIA.

Rolfe was a crossing watchman on the main line of the Southern Pacific Company. At the time of the accident a train known as the San Jose local, returning from San Francisco to San Jose, both within the State of California, approached the crossing. The watchman finding that he could not lower the gates without striking a team on the crossing, ran across the track with the intention of backing the horses away, was struck by the train and killed. An award of compensation was made to his widow under the State Compensation Law, but this award was annulled by the Court on the ground that Rolfe was employed in interstate commerce. The Court relying on the *Pedersen* case and quoting its language at length, concluded that since the crossing watchman's duty was to prevent collisions on the crossing, it extended to keeping the track itself free from obstructions, collisions, or interruptions.

In delivering the opinion of the Supreme Court of California, Angellotti, C. J., said:—

"The question here is, in the light of the evidence, a very narrow one, and is simply whether the principle of these decisions is applicable to one whose

duties are in part to keep the track free of such obstructions to the uninterrupted passage of trains according to schedule as may be caused by passing vehicles. So far as the relation of such an employe to one attempting to cross the track is concerned, it may be conceded that there is no ingredient of interstate commerce, and that, if the only consequence to be avoided by the employment was that of injury to such a person, the Act of Congress relied on would not be applicable. But in the light of the evidence it seems to us that the scope of the employment in which deceased was engaged at the time of the accident was broader, and extended to keeping the track itself in suitable condition for use as an instrumentality of interstate commerce. In view of the evidence, the work of such a crossing gateman or flagman, so far as the railroad is concerned, is similar, in principle, to that of the track walker, whose duty it is to see that the track is in safe condition for the passage of trains, to that of the employee in the signal tower, whose duty it is to supervise and give the signals for the passage of trains, and to that of the employe engaged in repairs on the automatic signal apparatus with which this petitioner's line is equipped. All such employes may fairly be said, it seems to us, to be directly engaged, in substantial part, at least, in keeping the track in suitable condition for use.

"There is, of course, no analogy between the case of one so engaged, and that of a train man engaged in the operation of an exclusively intrastate train. The duties of the latter are solely with reference to the operation and safety of the particular train on which he is engaged, and he has no duty whatever to perform in regard to keeping any instrumentality of interstate commerce in condition for use. Such is the full scope of his employment, and it has no relation whatever to interstate commerce, close or otherwise. The duties of deceased,

as we have seen, had to do directly with the keeping of an instrumentality of interstate commerce in suitable condition for the use of such commerce. And exactly as in the case of one engaged in repairing such an instrumentality after injury thereto has occurred, who concededly is engaged in interstate commerce, it is immaterial whether or not any interstate traffic was immediately to be had over the same. The deceased was actually engaged at the moment of the accident in protecting that instrumentality from injury. His situation in this regard was, in view of the evidence, the same as it would have been if he had been one of a number of guards stationed along the line of railroad to prevent third persons from removing the rails or unlawfully placing obstructions on the track. Certainly their work would not be held to be unrelated to the safety of the track as a highway of interstate commerce. While the exact question has not been decided by the Supreme Court of the United States so far as we have found, certain language of that court in the recent case of *Texas & Pacific Ry. Co. vs. Rigsby* (decided April 17, 1916), 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874, is significant. It was said:

"The doing of plaintiff's work, and his security while doing it, cannot be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce; for a failure to set the brakes so as temporarily to hold the "bad order" cars in place on that track would have been obviously dangerous to through traffic, while an injury to the brakeman had a tendency to cause delay in clearing the main line for such traffic. Perhaps upon the mere ground of the relation of his work to the immediate safety of the main track plaintiff's right of action might be sustained."

"In the light of what has already been decided by that court, we are of the opinion that any work having for its immediate object, in whole or in part, the

keeping of the track in condition for use according to schedule for interstate traffic, has such a close and direct relation to interstate transportation as to be practically a part of it, and that such work as deceased was engaged in at the time of his death was work of this character. The fact that the avoidance of injury to the public in the matter of crossing the track was also one of the objects of his employment is not material to the question before us.

"It follows that, in view of the Act of Congress relied on, the accident commission was without jurisdiction to make any award on account of the death.

"The award of the accident commission is annulled."

Sou. Pac. Co. vs. Industrial Accident Commission of the State of California, 161 Pac. 1139. 174 Cal. 8.

The foregoing facts are susceptible of stronger presentation against the argument of this brief than can be insisted on here, for the train with which Rolfe was concerned was concededly a purely intrastate train. But in the following decision by the same Court we have the very situation now before your Honors.

The deceased was a crossing watchman who was killed while flagging a train of undisclosed character. The only other difference worthy of note between this and the prior case is that here the tracks were not main line tracks of the Southern Pacific Company. The Court said:—

"The difference is not material, in view of the further showing that the line was used indiscriminately by the petitioner in its interstate and intrastate commerce. The line was thus a part of petitioner's passenger and freight system, both interstate and intrastate, and was in constant use for both purposes. There is no material distinction between the cases. The award of the Accident Commission is annulled."

Sou. Pac. Co. vs. Industrial Accident Commission, 161 Pac. 1142. 174 Cal. 16.

ILLINOIS.

The decedent Clark was a flagman on a street crossing of the railroad tracks at Springfield, Ill. A city ordinance required the railroads using the crossing generally, to maintain a flagman thereon. He was employed and paid by the Chicago and Alton Railroad which was reimbursed in part by the Chicago, Peoria and St. Louis Railroad. While Clark was on duty an interstate train of the C. P. & St. L. approached the crossing and at the same time an automobile was seen coming along the highway. The flagman walked over the tracks to flag the automobile and was struck in the back by the train and was killed. There was no train of the Alton approaching at the time.

Proceedings were brought by the Administrator for compensation under the Illinois Workmen's Compensation Act (Hurd's Rev. Stat., 1917, C. 48, Sect. 126-152). The Circuit Court affirmed an award of the State Industrial Commission in favor of the administrator and a writ of error was sued out by the Railroad. The Supreme Court of Illinois citing with approval *S. P. Co. vs. Industrial Accident Commission*, 174 Cal. 8, 161 Pac. 1139; and *S. P. Co. vs. Industrial Accident Commission*, 174 Cal. 16, 161 Pac. 1142 (*supra*), held that Clark at the time he received the injury was engaged in interstate commerce. The Court said:—

“Deceased was employed by the Alton for the purpose of preventing collisions between pedestrians or vehicles using Sangamon Avenue and trains using the railroad tracks which crossed Sangamon Avenue. He was employed to keep the tracks clear, so that nothing would interfere with the movement of the trains of the plaintiff in error. A flagman not only protects the public from being run down by locomotives, but he likewise protects the railroad company from having its trains derailed and its equipment put into disorder by a collision with something upon its right of way. The main consideration heretofore with reference to maintaining flagmen has been the damage to the

public which uses the crossing. With the coming into use of the automobile and the heavy automobile truck new considerations have arisen. A ponderous, swiftly moving locomotive, followed by a heavy train, is subjected to slight danger by a collision with a crossing pedestrian or a span of horses and a light vehicle, but when the passing vehicle is a ponderous steel structure a collision threatens not only the safety of its occupants or load, but also the safety of the passengers or freight on the colliding train.

* * *

"In *Graber vs. Duluth, S. S. & A. Railway Co.*, 15 Wis. 414, 150 N. W. 489, it is said:

"If the particular act, in any substantial part, is within the interstate field, then the federal law rules the situation, if either party sees fit to stand upon legal right in the matter. * * * The law does not permit of splitting up a service, which is in its nature an entirety, into its various steps or elements. Work in the repair of a bridge, as was said, which is used in intrastate as well as interstate business, and is indispensable to both, and in moving material to the location of the bridge for the purpose of its repair, and in moving an engine from the round-house to be used in hauling an interstate train, and work partly intrastate and partly interstate, as in preparing an engine to go out with a train made up of cars in interstate and in intrastate service, are all parts of an entirety having the efficient interstate commerce features required by the federal act. All work, so closely related to interstate commerce business as to be practically inseparable from it, though it promotes, at the same time, intrastate business, is in reality and legal effect a part of the former."

In the instant case deceased was engaged in the maintenance of the good order of the tracks of plaintiff in error—one of the instrumentalities used by it in the transportation of goods in interstate commerce.

* * *

We therefore conclude that Thomas Clark, deceased, was at the time of his injury employed in interstate commerce, and that the liability of the plaintiff in error is entirely fixed and governed by the Federal Employers' Liability Act. It follows that the Industrial Commission did not have jurisdiction of this proceeding, and the Circuit Court erred in not quashing the proceedings, record and award of the Industrial Commission.

The judgment of the Circuit Court is reversed and the cause remanded."

Chicago & A. R. Co. vs. Industrial Commission et al., 124 N. E. 344.

While it is true that an interstate train was approaching the crossing at the time of the accident, we submit that the fact in no way vitiates the decision as sustaining the petitioner's contention. The Court decides the case flatly on the ground that the crossing watchman was engaged in the maintenance of the good order of the crossing tracks as an instrumentality used in the transportation of goods in interstate commerce.

Flynn was a flagman at a city crossing. On the approach of an eastbound train he crossed over the eastbound tracks to flag the crossing, and while so engaged was standing near the westbound tracks. He was struck and killed by an engine drawing an interstate train on the westbound track. The Court of Errors and Appeals of New Jersey held that Flynn, at the time of his death was engaged in an act, to use the words of the Supreme Court of the United States, directly and immediately connected with interstate business, so as substantially to form a part or necessary incident thereto. Judgment awarding compensation reversed.

Flynn vs. N. Y., S. & W. R. Co., 101 Atl. 1034. 90 New Jersey Law 451.

In **Southern Railway vs. Puckett**, 244 U. S. 571, the plaintiff was engaged in assisting to raise a wrecked car from an interstate track, in order to extricate an injured employee. The Court below held:—

“That although plaintiff's primary object may have been to rescue his fellow employee, his act nevertheless was the first step in clearing the obstruction from the tracks, to the end that the remaining cars for train No. 75 might be hauled over them; that his work facilitated interstate transportation on the railroad, and that consequently he was engaged in interstate commerce when injured.”

This Court in affirming the decision said:—

“We concur in this view. From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce. The case is controlled by *Pedersen vs. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152; *New York Central & Hudson River R. R. Co. vs. Carr*, 238 U. S. 260, 263; *Pennsylvania Co. vs. Donat*, 239 U. S. 50; *Louisville & Nashville R. R. Co. vs. Parker*, 242 U. S. 13. *Pedersen vs. Delaware, Lackawanna & Western R. R. Co.*, *supra*, holds that a workman employed in maintaining interstate tracks in proper condition while they are in use is employed in interstate commerce; the other cases are to the effect that preparatory movements in aid of interstate transportation are a part of such commerce within the meaning of the Act.”

In **Montgomery vs. Southern Pacific Company**, 131 Pac. 507, at page 511, the Court said:—

“In the business of an interstate railroad, interstate and intrastate traffic is intermingled and usually handled indiscriminately. It would be practically

impossible to name any servant of an interstate road, who was employed exclusively in the furtherance of interstate traffic. *All employes who participate in the maintenance or operation of the instrumentalities for the general use of the road, thereby enhancing the utility of such commerce, are necessarily engaged in the work of interstate commerce, within the meaning of the Act.*"

In **L. & N. R. R. vs. Parker**, 242 U. S. 13, it was said:—

"The difference is marked between the mere expectation that the act done would be followed by other work of a different character, as in *Illinois Central R. R. Co. vs. Behrens*, 233 U. S. 473, 478, and doing the act for the purpose of furthering the later work. See *New York Central & Hudson River R. R. Co. vs. Carr*, 238 U. S. 260, 263; *Pennsylvania Company vs. Donat*, 239 U. S. 50; *Kalem Co. vs. Harper Bros.*, 222 U. S. 55, 62, 63."

In **Southern Pacific Co. vs. Industrial Accident Commission of California**, 251 U. S. 259, the decedent was an electric lineman, injured while wiping insulators on a power pole bearing wires that carried current to furnish power to move cars in both intrastate and interstate commerce. Applying the test suggested in the *Pedersen* case it was held that the work was directly and immediately connected with interstate transportation and an essential part of it.

In **New York Central R. R. vs. Porter**, 249 U. S. 168, it was held that an employee shoveling snow alongside interstate tracks was engaged in interstate commerce.

It would seem then that the nature of the employment in the instant case is equally significant. For the character of the crossing and tracks at Forrest Street is clearly fixed as interstate by the Referee's finding that interstate shipments and trains constantly passed over them, and we have exactly the same question as the Court passed on in the second California case cited. A crossing watchman flagging a train of undisclosed character over a crossing and tracks used in interstate commerce. Since then the findings clearly show the interstate character of the defendant's business at that place, and, that the performance of the decedent's duty of maintenance in good order was an element in operating or conducting that business over the Forrest Street crossing, it seems plain under the decisions that his character as engaged in interstate commerce at the time he was injured is fixed.

II. Since in an action brought under the Workmen's Compensation Act of Pennsylvania, the burden is upon the claimant to prove a case within the Act, was a prima facie case made out by proof that claimant's husband was employed as a crossing watchman by a common carrier by rail and that he was injured while engaging in the commerce conducted by the carrier over the tracks at the crossing?

The Supreme Court of Pennsylvania held that:—

"Plaintiff made out a *prima facie* case by showing, *inter alia*, the employment, work and accident in this State and the burden is on the defendant who interposed the Federal Statutes to prove facts necessary to bring the case within its terms. While a State Court can take judicial notice of an Act of Congress, it cannot take such notice of facts necessary to bring a particular case within its provisions. * * * There is no presumption that the train a watchman at a local crossing was flagging when killed was an interstate train. It is not a matter governed by presumption, but by proof (*Hench vs. Penna. R. R.*

Co., 246 Pa. 1), the burden of which rests upon the party alleging it; here the defendant. This familiar rule of evidence is especially applicable here, otherwise plaintiff must prove a negative, to wit, that her husband was not killed while flagging an interstate train and must do so when the evidence as to whether it was such or not is peculiarly within the knowledge of the defendant. It was its duty to individuate the particular act in which the deceased was engaged, and show by competent evidence the train in question, and that it was an interstate train or at least that his act had some reasonably direct connection with such train (*Osborn vs. Gray*, 241 U. S. 16)."

(Opinion, Record, page 35.)

The Workmen's Compensation Board, affirmed by the Supreme Court of Pennsylvania, held:—

"Under the proofs, we have an employee performing his duties for an employer and suffering death in the course of that employment with the facts undisclosed by the testimony as to whether he was engaged in an interstate or intrastate activity at that time. The claimant, therefore, established a *prima facie* case entitling her to compensation which has not been overcome by any proof whatsoever."
(Opinion, Record, page 23.)

This reasoning proceeds upon a mere presumption of jurisdiction, it would seem to involve a fundamental error and it totally ignores the numberless decisions in State and Federal Courts upon the question of jurisdiction. Where the Court is of general jurisdiction, he who denies the jurisdiction has the burden of proof, but even in such decisions, it is generally held that there is no presumption of jurisdiction where a Court, although of general jurisdiction, exercises special statutory powers in a special statutory manner or otherwise than according to the course of the common law.

On the other hand it is universally held that the exercise of jurisdiction by courts of special and limited jurisdiction does not raise a presumption of the requisite jurisdictional facts for nothing is presumed to be within the jurisdiction of such courts. One who relies upon a decision of such court, or who claims any right or benefit under its proceedings, must affirmatively show its jurisdiction in the premises by alleging and proving the same.

Brown vs. Keene, 8 Peters 112; **Galpin vs. Page**, 18 Wall. 350; **Grignon's Lessee vs. Astor et al.**, 2 How. 319.

In **Deming vs. McClaughery**, 113 Fed. 639, Judge Sanborn said: "The legal presumption is that Courts of general jurisdiction have the power and the authority to make the adjudications which they render and that their judgments are valid. But no such presumption accompanies the sentences of Courts of inferior or limited jurisdiction. It is indispensable to the maintenance of their judgments that their jurisdiction shall be clearly and unequivocally shown. *Runkle vs. U. S.* 122 U. S. 543, 546; *Mills vs. Martin*, 19 Johns 7, 30; *Wise vs. Withers*, 3 Cranch 331; *Ex parte Watkins*, 3 Peters, 193, 207; *Dynes vs. Hoover*, 20 Howard, 65, 80."

The Workmen's Compensation tribunals exercise special statutory powers in a special statutory manner and in contravention of the common law. They are also bodies exercising a special and limited jurisdiction otherwise than according to the course of the common law. The Statute itself only gives jurisdiction over that class of employers and employees who fail to reject the elective compensation Article. (Appendix, page 32.)

In the case of **New York Central Railroad vs. White**, 243 U. S. 188, which was an appeal challenging the constitutionality of the New York Workmen's Compensation Act, Mr. Justice Pitney said, "The scheme of the Act is so wide a departure from common law standards respecting the responsibility of employer to employee, that doubts naturally have been raised respecting its constitutional validity."

And in **Southern Pacific Co. vs. Jensen**, 244 U. S. 205, an appeal from the same State, Mr. Justice McReynolds, delivering the opinion of the court, said, "The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction."

By burden of proof we mean "the necessity which rests on a party at any particular time during a trial to create a *prima facie* case in his own favor or to overthrow one created against him." It results from this at the beginning of every trial the burden is on the plaintiff as to the existence of every fact essential to the affirmative case, and nothing less than the establishment of a *prima facie* case will shift the burden. Now *prima facie* evidence of a fact "is such as in judgment of law is sufficient to establish the fact; and if not rebutted remains sufficient for the purpose." **Kelly vs. Morris**, 6 Peters 622, 631 per Story, J.

The Pennsylvania Workmen's Compensation Act of June 2, 1915, P. L. 736, applied in terms (Article I, Section 1) "To all accidents occurring within this Commonwealth," and provided (Article III, Section 301) "When employer and employee shall by agreement either express or implied, accept the provisions of article three of this Act, compensation for personal injury, to or for the death of such employee, by an accident in the course of his employment, shall be made in all cases by the employer." (Appendix, page 32.) Certainly these words by themselves are sufficient to include every accident and every class of employment.

Before they became effective, however, the Act of June 3, 1915, P. L. 777, had provided (Section 1) "That nothing contained in any article or any section of an Act entitled the Workmen's Compensation Act of 1915,

shall apply to or in any way affect any person, who at the time of injury, is engaged in domestic service or agriculture." (Appendix, page 35).

The Compensation Act then never applied to workmen in these classes of employment. Neither did it apply to employees of common carriers by rail except when they were not engaged in interstate commerce. True they were not excluded in terms, but this Court has repeatedly held that "The Federal Employers' Liability Act of 1908 supersedes the laws of the States upon all matters within its scope, and in cases involving accidents happening upon interstate railroads, to employees engaged in interstate commerce, such state laws must be viewed as non-existent."

In Second Employers' Liability cases, 223 U. S. 1, 57, the Court said:—

"The suggestion that the Act of Congress is not in harmony with the policy of the State is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted the Act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the Act had emanated from its own legislature, and should be respected accordingly in the Courts of the State. As was said by this Court in *Claffin vs. Houseman*, 93 U. S. 130, 136, 137:

"The laws of the United States are laws in the several States, and just as much binding on the citizens and courts hereof as the State laws are.
* * * The two together form one system of jurisprudence which constitute the law of the land for the State."

All doubt as to the scope of the Federal Act was set at rest on May 21, 1917, when this Court held that: "The liabilities and obligations of interstate railroad carriers

to make compensation for personal injuries suffered by their employees while engaged in interstate commerce are regulated both inclusively and exclusively by the Federal Employers' Liability Act; and Congress having thus fully covered the subject, no room exists for state regulation, even in respect of injuries occurring without fault, as to which the Federal Act provides no remedy. Therefore an award made under the New York Compensation Act, under such circumstances cannot be upheld." **N. Y. C. R. R. vs. Winfield**, 244 U. S. 147.

The Compensation Act, therefore, must now be read as if it set forth in terms that it applied to all accidents occurring in Pennsylvania except in domestic, in agricultural and in interstate employment, and that compensation must be paid by all employers unless the employee is engaged in domestic service, agriculture or the interstate service of a common carrier by rail.

What was the burden the claimant had to meet to establish *prima facie* a right of recovery under the Act of Assembly pleaded? Certainly the essential averments of the petition had to be proved, such as marriage, dependency, employment, wages, injury, etc.

The printed petition with blanks, which a claimant is required by the Compensation Board to fill in, takes the form of question and answer. Certain pertinent questions in this petition and the answering averments follow:

(1) That Pasquale Di Donato died on March 18, 1918 as the result of an accident occurring in the course of his employment.

(5) By whom was deceased employed at the time of the accident? Philadelphia and Reading Railway Company.

(8) What kind of work was the deceased employee doing at the time of the accident? Watchman at crossing.

(9) Give a full description of the accident and state how it caused the death of the deceased employee? Run over Forest St. Crossing, Conshohocken, Penna. (Claim Petition, Record, page 6).

What the claimant must be taken to mean by these averments is that the employee when injured was engaged in some intrastate task. For commerce is to be regarded as of two kinds "inter and intrastate" as was said in *Hench vs. P. R. R.*, 246 Pa. 1, 9; and to plead employment in the service of a common carrier by rail as a watchman at a grade crossing and injury in the course of that employment by the operation of the business over that crossing compels the conclusion that the decedent was engaged in some kind of commerce. It is true that under the Compensation Law the pleadings are very informal and under any strict rule imperfect, but we submit that since the claimant brought her suit under this Act and attempted to set forth the nature of the work and the cause of the injury, she cannot impose any burden of evidence upon the defendant by the failure to set them forth fully and sufficiently. She must necessarily be presumed to mean that the employee was engaged in some intrastate task, if there be such a thing in the case of a crossing watchman.

The defendant cannot demur, it is required to answer specifically, and it did specifically answer (Answer, Record, page 10), and denied liability on the ground that the work was of interstate character. This was not to introduce a new element in the case, but was a denial of the claimant's allegation that the employment was within the provisions of the Workmen's Compensation Act.

THERE CAN BE NO PRESUMPTION THAT THE TRAIN WHICH DI DONATO WAS FLAGGING WAS AN INTRASTATE TRAIN.

Mr. Wigmore in the 4th volume of his work on Evidence, page 3535, Sect. 2491, says: "The peculiar effect of a presumption of law is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent."

Since there was no proof as to the particular train the watchman was flagging over the crossing, there could naturally be no proof as to its character and far from

compelling a conclusion on the point there was nothing to even suggest a conclusion.

In Pennsylvania the relation of master and servant with respect to injuries arising in railroad service is regulated both by Federal and State law and a plaintiff must proceed under that law which is applicable. Where the Federal statute is pleaded and its applicability is denied by the answer, the plaintiff must prove his allegation of interstate employment before he can put the defendant to any proof at all.

The case of **Hench vs. P. R. R.**, 246 Pa. 1, relied on by the Supreme Court of Pennsylvania in its opinion, asserts this rule and holds that where "the facts proved did not show what kind of commerce the decedent was engaged in at the time of the accident there is no more presumption that it was interstate than intrastate commerce, if indeed, it can be said there is any presumption at all under the circumstances. The burden was on the plaintiff to prove facts to show that her husband was engaged in interstate commerce at the time he received his injuries and as to these essential facts the proofs failed to make out a *prima facie* case."

This is undoubtedly the correct rule and hence it would seem to follow necessarily, that where the jurisdiction of the State Compensation tribunals is denied by the answer the claimant must make the like proof. This was the result reached by the highest court in New Jersey in a proceeding brought under the Compensation law of that State.

In **Lincks vs. Erie R. R. Co.**, 91 New Jersey Law 166 160, it was held:—

"The fundamental question to be now decided, therefore, is whether the engine upon which the decedent had just finished his work, or that upon which he was about to commence his work, was either of them, intended to be presently used in interstate or in intrastate commerce. If, in the former, the carrier's liability is to be determined solely under the

federal statute; if in the latter, then the state statute applies. As we have already pointed out, there is absolutely no testimony whatever upon this vital point. This being so, neither the judgment of the Common Pleas nor that of the Supreme Court has any foundation of fact upon which to rest. The burden was upon the petitioner in the court of the first instance to prove a case within the state statute—that is, to show, affirmatively, that the plaintiff's decedent was engaged in a service which was not regulated by the federal statute, for that fact is not to be presumed in the absence of proof."

In *Osborne vs. Gray*, 241 U. S. 16, relied on by the Supreme Court of Pennsylvania, the plaintiff was before a State Court of general jurisdiction and proved a case of negligence under the State law. The applicability of the Federal Employers' Liability Act was urged by the defendant and was finally denied by this Court on the ground that the defendant having cognizance of the facts had failed to prove anything to bring the case within the Federal law.

The reliance below upon this and other cases would seem to indicate a persistent refusal to meet the question raised. The petitioner did not and does not contend, as stated by the courts below, that the burden is on the claimant to prove a negative. It asks no more than that when the issue is raised upon petition and answer the claimant shall prove the jurisdictional facts, the essential requirement here being proof of facts, from which an engaging in intrastate commerce may be inferred. At the very least the defendant cannot be called upon for proof that a particular train was an interstate train when the claimant fails to identify the train.

There may be, on the grounds of public policy, strong reason for placing on a defendant railroad company, under certain circumstances, the burden of proving facts peculiarly within its knowledge. But although the Supreme Court of Pennsylvania places its decision on this ground the decision goes far beyond any such reason. For here

the essential fact is not within the railroad company's knowledge. The claimant rests with proof that her decedent was flagging a train (which may have been either an inter or an intrastate train) at an hour when there was a great volume of traffic over the defendant's main artery of travel. There is nothing to show whether the train was going north or south, whether it was a passenger, freight or coal train, or any other fact which would enable the defendant to identify it and ascertain its character. On this vital point the claimant is absolutely silent, and the ruling of the Supreme Court of Pennsylvania imposes on the defendant a burden impossible to be borne. The defendant might show for instance a movement of one intrastate and nineteen interstate trains about the time of the accident, to be met with the perfectly valid objection that there is no proof as to which train was approaching and no presumption that decedent was not flagging the intrastate train. We submit there is no rule or presumption of law that can be invoked to impose so heavy a burden upon the defendant.

This is not like *Osborne vs. Gray*, a case where the Court has the requisite jurisdiction and where the only question is whether the provisions of a Federal or State Statute should be applied. The Compensation tribunals have not jurisdiction unless the parties are engaged in intrastate commerce. It is this distinction, which the Supreme Court of Pennsylvania failed to grasp but which clearly appears in the decision of the Court of Errors and Appeals of New Jersey in *Lincks vs. Erie RR.* (*supra*).

The distinction, however, has been recognized by the Pennsylvania Courts and the situation here presented is essentially the same as in any case where the State law must defer to the paramount authority of an Act of Congress.

On June 4, 1901, the legislature of Pennsylvania passed an Act entitled an Act relating to Insolvency, etc., P. L. 404. This established a complete system for the settling of insolvent estates in the State of Pennsylvania. Some years before, however, Congress had passed a general law

in relation to bankruptcies, Act of July 1, 1898, Chapter 541, entitled an Act to establish a uniform system of bankruptcy throughout the United States. It provided, Chapter 3, Sect. 4 (b) that any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, may be adjudged an involuntary bankrupt. It was not long before a question arose requiring determination by the Courts of this State.

An assignee for the benefit of creditors petitioned the Court to set aside a writ of execution, in accordance with the 16th Section of the Act of June 4, 1901, on the ground that the assignor was a farmer and therefore not within the provisions of the Federal Bankrupt Act. Now under the theory as to the burden of proof now laid down by the Supreme Court of Pennsylvania, the petitioner having pleaded a case within the State Insolvency Act, was entitled to the benefit of that Act unless the defendant should exclude him and put him under the Federal law by proving that he was not a farmer. As to that contention the Court said:—

“Wage earners and persons engaged chiefly in farming or the tillage of the soil cannot be subjected to the provisions of that Act (*i. e.*, the Federal Bankrupt Law) without their consent and as to such persons the Act of June 4, 1901, P. L. 404, is in force. This statute is only suspended as to persons who can be made subject to the provisions of the Federal Bankrupt Act. * * * True the assignee alleged in his petition that the defendant, the assignor, was a farmer, but this was explicitly and unequivocally denied by the answer. The undisputed facts of the case set forth in the petition and answer neither give rise to, nor permit a presumption of fact that at the time of the assignment the assignor belonged to that class of persons excepted from the provisions of the bankruptcy act. As to that question the petitioner assumed the

affirmative, as we think he was bound to do, and alleged in his petition the fact necessary to bring the case within the exception to the general rule established by the Act of Congress, but as this allegation was denied in the answer, it was incumbent on him to follow it by proof."

Charles vs. Smith, 29 Pa. Superior Ct. 594.

The striking and true analogy here presented is manifest. The State legislation is suspended as to all except those persons not included in the Federal law. In the one case farmers, in the other intrastate railroad employees may claim the benefits of the State law, but when their status is denied they must prove it.

The effect in the case at bar of the ruling of the State Court as to the burden of proof is to deprive defendants of the right to the protection of the Federal Act. If the jurisdiction of the Compensation tribunals is to be presumed, any claimant may bring a proceeding under the Compensation law and by vague and inconclusive testimony effectually preclude the possibility of a defense.

It would seem from the following decisions that it is not within the powers of the State Court to lay down as a matter of mere State procedure a rule governing the burden of proof in cases involving a Federal right.

In **Central Vermont Ry. Co. vs. White**, 238 U. S. 507, this Court held that in an action under the Employers' Liability Act the burden of proof as to whether the employee was guilty of contributory negligence is a matter of substance and not of mere State procedure.

In **New Orleans & North Eastern R. R. vs. Harris**, 247 U. S. 367, the so-called "*Prima Facie* Act" of Mississippi was involved. That Act provided that in any actions against railroads for damages, proof of injury inflicted by an engine propelled by steam shall be *prima facie* evidence of negligence. Since negligence is held to be essential to recovery under the Federal Act this Court held that the question of burden of proof is a

matter of substance and not subject to control by laws of the several states.

In **Lee vs. Central of Georgia Ry.**, 252 U. S. 109, 110. This Court relying on the cases just cited held that when matters nominally of procedure are actually matter of substance which affect a Federal right, that the decision of the State Court therein becomes subject to review by this Court.

Suit was brought to recover damages for mental suffering caused by the erroneous transmission of a telegraph message between points in North Carolina. The route ordinarily used by the Telegraph Company was through Virginia and the Company defended on the ground that the message was sent in interstate commerce and that therefore a suit could not be maintained for mental suffering alone. The Court below held that when, as here, the termini were in the same State the business was intrastate unless it was necessary to cross the territory of another State in order to reach the final point. This Court said:—

“This, as we have said, is not the law. It did, however, lay down that the burden was on the Company to show that what was done was not done to evade the jurisdiction of the State. If the motive were material, as to which we express no opinion, this again is a mistake. The burden was on the plaintiff to make out her case.”

Western Union Telegraph Company vs. Speight, No. 241 of October Term, 1920.
(Not yet reported.)

In **McNeill vs. Southern Railway Co.**, 202 U. S. 543, 561, the Court said:—

“Without at all questioning the right of the State of North Carolina in the exercise of its police

authority to confer upon an administrative agency the power to make many reasonable regulations concerning the place, manner and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subject made by the State or under its authority which directly burdens interstate commerce is a regulation of such commerce and repugnant to the Constitution of the United States." *Houston & Texas Central Ry. Co. vs. Mayes*, 201 U. S. 321; *American Steel & Wire Co. vs. Speed*, 192 U. S. 500.

In *Erie Railroad Company vs. Amy Winfield*, 244 U. S. 170, the question was raised that the carrier was bound contractually to make compensation by reason of the provision that an agreement to be bound by this part of the State Compensation Law shall be presumed unless the contrary appear in the contract of hiring. As to this contention, the Court said:—

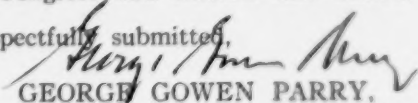
"There was no express agreement in this instance, and there is no basis for regarding the carrier as in any way bound by this part of the statute, save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption cannot be indulged here and this for the reason that by the Federal Act, the entire subject as respects carriers by railroad and their employes in interstate commerce, was taken without the reach of State Laws. It is beyond the power of any State to interfere with the operation of that Act, either by putting the carriers and their employes to an election between its provisions and those of a State statute, or by imputing such an election to them by means of a statutory presumption."

In *Northern Pacific Ry. Co. vs. North Dakota*, 250 U. S. 135, 150, it was held that:—

"The elementary principle that under the Constitution the authority of the Government of the United States is paramount when exerted as to subjects concerning which it has the power to control, is indisputable. This being true, it results that although authority to regulate within a given sphere may exist in both the United States and in the States, when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is, that to the extent that any conflict arises the state power is limited, since in case of conflict that which is paramount necessarily controls that which is subordinate.

Again, as the power which was exerted was supreme, to interpret it upon the basis that its exercise must be presumed to be limited was to deny the power itself. Thus, once more it comes to pass that the application of the assumed presumption was in effect but a form of expression by which the power which Congress had exerted was denied."

Respectfully submitted,


GEORGE GOWEN PARRY,

Counsel for Petitioner.

APPENDIX.

ACT OF JUNE 2, 1915, CALLED THE WORKMEN'S COMPENSATION ACT, PENNSYLVANIA PAMPHLET LAWS, 1915, PAGE 736.

NO. 338.

AN ACT

Defining the liability of an employer to pay damages for injuries received by an employe in the course of employment; establishing an elective schedule of compensation; and providing procedure for the determination of liability and compensation thereunder.

Article I. Interpretation and definition.

Article II. Defining the liability of an employer in an action at law for damages for personal injury to an employe, and abolishing in whole or in part certain defenses thereto.

Article III. Establishing a system of compensation by agreement; prescribing the method by which such agreement shall be made and terminated; defining the injuries for which compensation is payable, the persons to whom it is payable, its amount, and the condition under which and the manner in which it is payable.

Article IV. Providing a procedure for the determination and settlement of claims for compensation.

Article V. General provisions.

ARTICLE I.

Interpretation and Definition.

Section 1. Be it enacted, &c., That this act shall be called and cited as The Workmen's Compensation Act of 1915, and shall apply to all accidents occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and shall not apply to any accident occurring outside of the Commonwealth.

* * * * *

Section 107. The term "Bureau" when used in this act shall mean the Bureau of Workmen's Compensation of the Department of Labor and Industry.

The term "Board" when used in this act shall mean the Workmen's Compensation Board of the Bureau.

* * * * *

ARTICLE III.

Elective Compensation.

Section 301. When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of article three of this act, compensation for personal injury to, or for the death of, such employee, by an accident, in the course of his employment, shall be made in all cases by the employer, without regard to negligence, according to the schedule contained in sections three hundred and six and three hundred and seven of this article; provided that no compensation shall be made when the injury or death be intentionally self-inflicted, but the burden of proof of such fact shall be upon the employer.

* * * * *

Section 302. (a) In every contract of hiring made after December thirty-first, one thousand nine hundred and fifteen, and in every contract of hiring renewed or extended by mutual consent, expressed or implied, after said date, it shall be conclusively presumed that the parties have accepted the provisions of article three of this act, and have agreed to be bound thereby, unless there be, at the time of the making renewal, or extension of such contract an express statement in writing, from either party to the other, that the provisions of article three of this act are not intended to apply, and unless a true copy of such written statement, accompanied by proof of service thereof upon the other party, setting forth under oath or affirmation the time, place and manner of such service, be filed with the Bureau within ten days after such service and before any accident has occurred. Every contract of hiring,

oral, written, or implied from circumstances, now in operation, or made or implied on or before December thirty-first, one thousand nine hundred and fifteen, shall be conclusively presumed to continue subject to the provisions of article three hereof, unless either party shall, on or before said date, in writing, have notified the other party to such contract that the provisions of article three hereof are not intended to apply, and unless there shall be filed with the Bureau a true copy of such notice, together with proof of service, within the time and in the manner hereinabove prescribed:

* * * * *

ARTICLE IV.

Section 412. If, after any accident, the employer and the employe or his dependent, concerned in any accident, shall fail to agree upon the facts thereof and the compensation due under this act, the employe or his dependent may present a claim for compensation to the Board.

ACT OF JUNE 2, 1915, PENNSYLVANIA PAMPHLET LAWS,
1915, PAGE 758.

No. 339.

AN ACT

To provide for the administration of the Workmen's Compensation Act of 1915 by creating the Bureau of Workmen's Compensation of the Department of Labor and Industry; providing for the establishment of a Workmen's Compensation Board to have charge of such Bureau; authorizing the division of the Commonwealth into workmen's compensation districts, and the appointment of Workmen's Compensation Referees; defining the powers and duties of the Commissioner of Labor and Industry, the Bureau of Workmen's Compensation, the Workmen's Compensation Board, the Workmen's Compensation Referees, and the factory inspectors of the Department of Labor and Industry, in enforcing the said act; and fixing the salaries of the members of the Workmen's Compensation Board, the Workmen's Compensation Referees, and certain of their employes and assistants.

Section 1. Be it enacted, &c., That the Bureau of Workmen's Compensation of the Department of Labor and Industry is hereafter called Bureau.

The Workmen's Compensation Board is hereinafter called the Board.

The Commissioner of Labor and Industry is hereinafter called the Commissioner.

The Workmen's Compensation Referee is hereinafter called the Referee.

Section 2. The Bureau of Workmen's Compensation of the Department of Labor and Industry is hereby created.

Section 3. The Board is hereby created to supervise and direct the Bureau. It shall consist of three members, who shall be appointed by the Governor, by and with the advice and consent of the Senate. The Commissioner shall be an ex officio member of the Board, but shall not vote on orders, decisions, or awards. The members of the Board shall be appointed for terms of four years, but they shall at all times be removable by the Governor, by and with the advice and consent of the Senate.

• • • • •

Section 6. It shall be the duty of the Board, immediately upon its organization, to divide the Commonwealth into districts to be known as workmen's compensation districts. Each district shall, as near as may be practicable, be compact and of contiguous territory.

Section 7. As soon as such districts shall have been created, the Commissioner, with the approval of the Governor, shall appoint as many Referees as shall be necessary to fulfill the purposes of this act, not to exceed ten in number.

• • • • •

Section 13. It shall be the duty of the Board to make all proper and necessary rules and regulations for the conduct of the Bureau, and to promptly hear and determine all petitions and appeals, and to perform such other duties as shall be required by law.

• • • • •

Section 17. The Board and every Referee shall have the power to conduct any investigation which may be deemed necessary to ascertain the facts of any claim or

any other matter properly before such Board or Referee. Such investigations may be made by the Board or Referee, personally, or by any inspector of the Department of Labor and Industry, or by any other person or persons authorized by law. Every inspector of the said Department of Labor and Industry is hereby empowered and directed to conduct any investigation authorized by this act, at the request of the Board or any Referee, with the consent of the Commissioner.

* * * * *

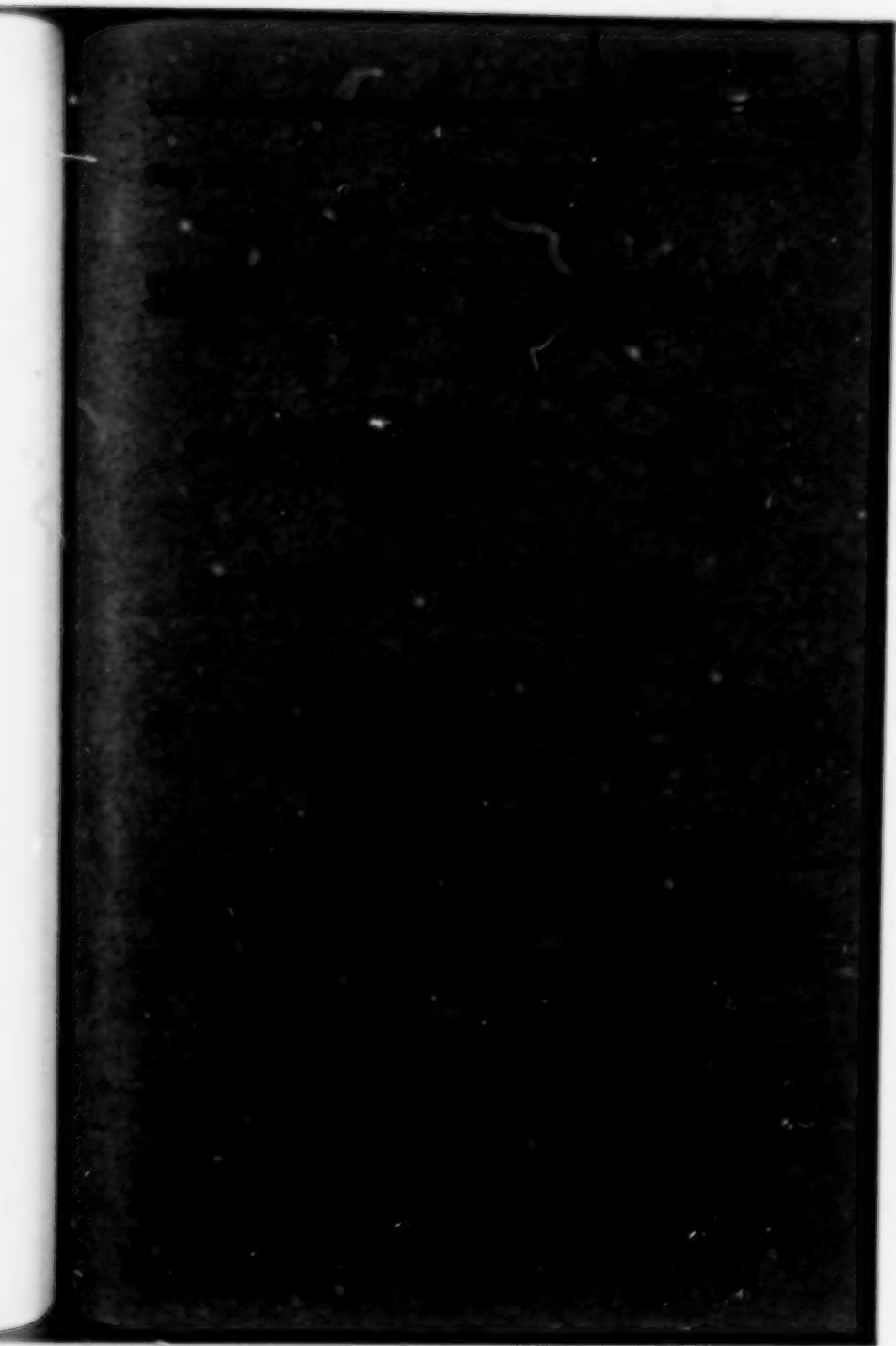
ACT OF JUNE 3, 1915, PENNSYLVANIA PAMPHLET LAWS,
1915. PAGE 777.

No. 343.

A SUPPLEMENT

To an act, entitled "The Workmen's Compensation Act of 1915," to exempt domestic servants and agricultural workers from the provisions thereof.

Section 1. Be it enacted, &c., That nothing contained in any article or any section of an act, entitled the Workmen's Compensation Act of 1915, shall apply to or in any way affect any person who, at the time of injury, is engaged in domestic service or agriculture.

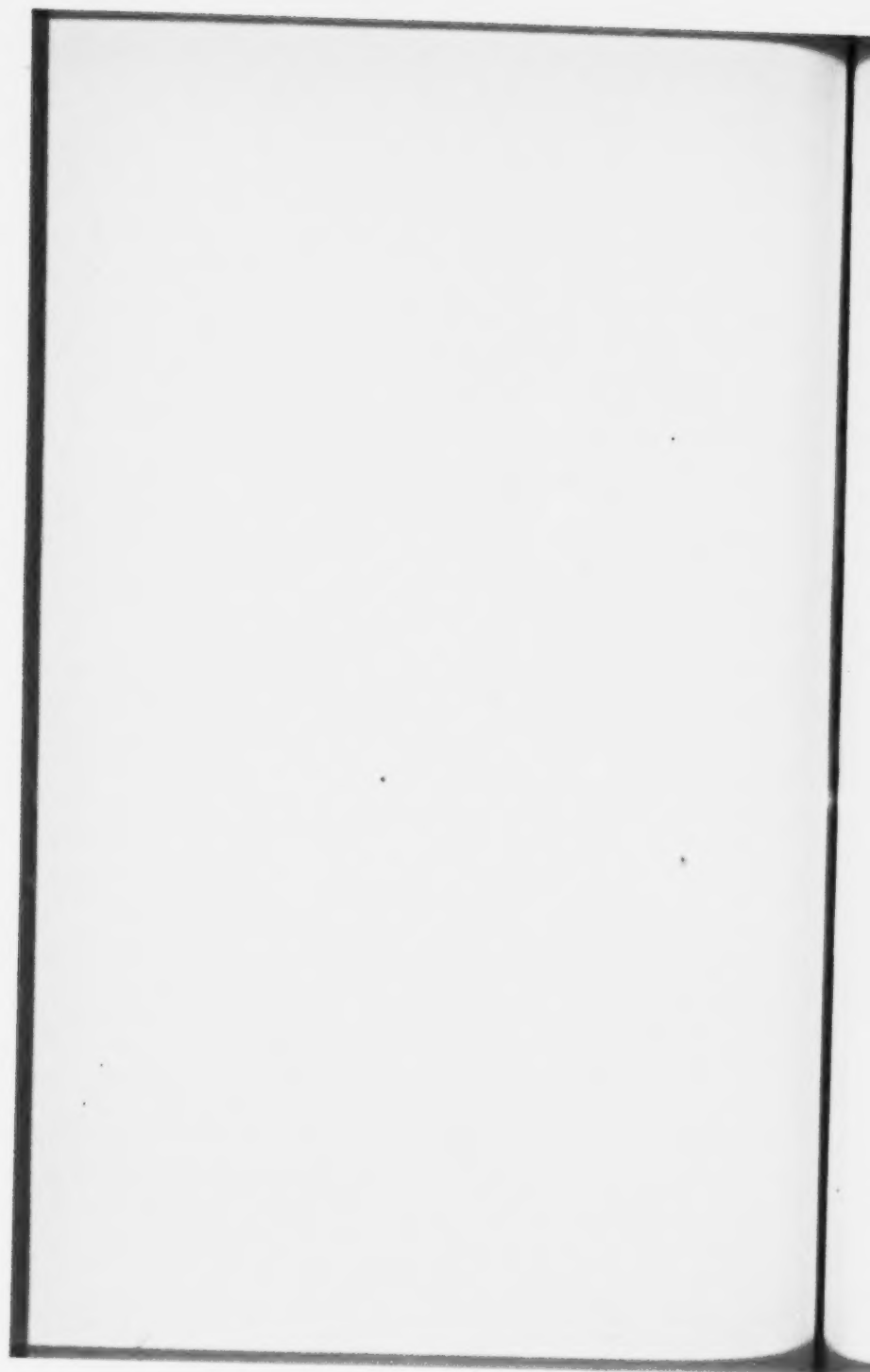


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IN THE
Supreme Court of the United States.

No. 297. October Term, 1920.

PHILADELPHIA & READING RAILWAY
COMPANY,

Petitioner,

vs.

MARIA DOMENICA DIDONATO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENT.

ARGUMENT.

I.

The first question involved in the present case is
whether or not the Supreme Court of Pennsylvania

erred in holding that the interstate or intrastate character of the employment or service of a flagman at a grade crossing of an interstate railroad depends on the character of the particular train which he was flagging when injured.

The cases decided by this court fall into two distinct classes: those in which the service is given to expedite or secure the safety of some particular traffic movement and those in which it is impossible to assign the service to any particular traffic movement, since the work is done on some instrumentality which is used indiscriminately in the general traffic of the road.

In the first class, the service takes on the character, interstate or intrastate, of the particular traffic movement. In the second, since part of the general traffic of every interstate carrier is necessarily interstate, the service, following the character of such general traffic, is also interstate.

It is submitted that the present case falls within the first class and that therefore it is not controlled by the case of **Pederson v. Delaware etc. R. R.**, 229 U. S. 146, on which the petitioner relies and which is the first and leading case of the second class.

In both classes, the determining question is that stated in **New York Central Railroad v. Carr**, 238 U. S. 260:

“Whether the employee is engaged in interstate business, or in an act so directly and immediately connected with such business as to substantially form a part or necessary incident thereof.”

And it is well settled, that it is the particular service upon which the employee is engaged at the time of his injury which is the determining factor, **Illinois Central Railroad v. Behrens**, 233 U. S. 473, and not the

predominant character of his general duties. What he had been doing immediately before or what he was expected to do directly after is immaterial, **Illinois Railroad v. Behrens**, *supra*; **Erie R. R. v. Welsh**, 242 U. S. 303 **Minnesota etc. R. R. v. Winters**, 242 U. S. 353. Thus the character of an employee's service may change constantly during his working day, as he is called to aid the one or the other class of traffic. But no matter how temporary the particular service, if it is in aid of a specific traffic movement, it follows the character of that movement. And this is not restricted to services necessary for the movement of the particular traffic, such as those of a member of the train or switching crews moving trains or cars containing interstate or intrastate passengers or freight, as in **Illinois Central Railroad v. Behrens**, 233 U. S. 473, or doing the switching and drilling necessary to separate intrastate cars from an interstate train so that it may proceed on its way, as in **New York Central Railroad v. Carr**, 239 U. S. 260, or of a car-repairer repairing a drawbar on a car then in use in interstate commerce, **Walsh v. New York, New Haven and Hartford Railroad**, 223 U. S. 1, or of an employee called from other work to help remove wreckage and clear the track for some particular traffic movement, as in **Southern Ry. v. Puckett**, 244 U. S. 571. It is applied as fully to those services which look to the safety of the train, its crew, passengers and freight. Thus the character of the service of a car inspector is determined by the interstate or intrastate character of cars which he is inspecting, **Boyle v. Pennsylvania Railroad**, 228 Fed. 266, and those of a watchman in a freight yard by the character of the cars which are resting en route thereon, **Chicago, Rock Island and Pacific Railroad v. Industrial Commission**, 273 Ill. 528.

It is only where it is impossible to ascribe the par-

ticular service, on which the employee is engaged at the time of his injury, to some particular movement of the one or the other form of commerce, that the general nature of his employer's business as interstate carrier controls. Even where the employee is working on an instrument of commerce, the general nature of his employer's business controls only where the use of such instrument in both sorts of commerce is inextricably intermingled. Where the instrumentality is, like rolling stock, used for a succession of distinct traffic movements, its character, and so the character of the employee working on it, is fixed by the nature of the traffic in which it is employed at the time the work is being done, *Minnesota etc. R. R. v. Winters*, 242 U. S. 353. Here too it is immaterial that its predominant use was in interstate commerce or that it had just finished an interstate run when put in the shops for repair or even that the first service to which it was put to after leaving the shop was interstate.

But where the instrumentality is part of the roadbed and its appurtenant appliances, such as signal towers, switches and the like, the work done thereon, while done on a particular occasion, is not done to aid the next succeeding traffic movement but to aid all those movements which occur while the results of the work remain in the physical condition of the roadbed and appliances. So too, where necessary supplies such as coal, water or sand are stored in readiness for use in either form of commerce as the need arises, it is obvious that the work is not done to aid any particular traffic movement but to serve the general traffic indiscriminately until the supply is exhausted.

Such services, while as essential to the expedition of commerce as the operative services of those directly aiding in moving it, are incapable of ascription to any particular traffic movement or to either of the sorts of

commerce carried by the road. It is impossible to separate the use of a permanent part of a roadbed, bridge, signal tower, water tank or coal bin into its component elements of intrastate and interstate use; the two are inextricably mingled, and it was therefore necessary to choose between regarding all work done to maintain them in condition for use by repairing or filling them, as being intrastate or interstate in character. It was therefore held in *Pederson v. Delaware, Lackawanna and Western Railroad*, 229 U. S. 146, though by a bare majority of the court, that a workman carrying bolts for the repair of a bridge, which formed part of the carrier's roadbed upon which both intrastate and interstate traffic regularly passed, was engaged in interstate commerce. But this test is only applied when it is impossible to ascribe the service to any particular traffic movement. It has only been applied in its own peculiar field, the maintenance of the roadbed, bridge and equipment "in proper condition while in use", and to the storing of supplies for the indiscriminate use of the general traffic.

This case has been followed and applied in **New York Central Railroad v. Winfield**, 244 U. S. 146, in which a section hand was injured while tamping ties between railroad tracks; in **New York Central Railroad v. Porter**, 249 U. S. 168, in which a railroad employee was injured while shoveling snow from its right of way, in **Southern Pacific Railroad v. Industrial Accident Commission**, 251 U. S. 259, in which an electric lineman was killed while engaged in maintenance work upon a cable by which electricity was conveyed from the railroad's power house to its trolley wires; in **Erie Railroad v. Collins**, 253 U. S. 77, in which the employee was injured while starting a gasoline engine so that it might pump water into a tank from which engines hauling both interstate and intrastate trains drew their supply, and in **Erie Railroad v. Szary**, 253 U. S. 86, in

which a workman who was employed to dry sand for the indiscriminate use of locomotives hauling the general traffic of the railroad was injured while performing a necessary part of his duties.

In *Southern Pacific Railroad v. Puckett*, 244 U. S. 571, an inspector, who was inspecting interstate cars, was called from his work to aid in raising from an interstate track a wrecked car, under which a member of the train crew was imprisoned.

The court below held:

"Although plaintiff's primary object may have been to rescue his fellow employee, his act nevertheless was the first step in clearing the obstruction from the tracks, to the end that the remaining cars for train No. 75 might be hauled over them; that his work facilitated interstate transportation on the railroad, and that consequently he was engaged in interstate commerce when injured."

This Court in affirming the decision said:

"We concur in this view. From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce. The case is controlled by *Pederson v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152; *New York Central & Hudson River R. R. Co. v. Carr*, 238 U. S. 260, 263; *Pennsylvania Co. v. Donat*, 239 U. S. 50; *Louisville & Nashville R. R. Co. v. Parker*, 242 U. S. 13. *Pedersen v. Delaware, Lackawanna & Western R. R. Co.*, *supra*, holds that a workman employed in maintaining interstate tracks in proper condition while they are in use is employed in interstate commerce; the other cases are to the effect that preparatory movements in aid of interstate transportation are a part of such commerce within the meaning of the Act."

It is important to note that while the case of *Pedersen v. Delaware etc. Railroad* was given as authority, the cases of *New York Central v. Carr*, *Pennsylvania R. R. v. Donat* and *Louisville & Nashville R. R. v. Parker* were also relied upon and of themselves were sufficient to support the decision, since the wreckage was being cleared to permit a particular interstate train to be hauled over the track. And it is perhaps significant that this Court refused a certiorari in the case of **Philadelphia and Reading R. R. v. Reynolds**, 253 U. S. 486, in which the Supreme Court of Pennsylvania had held (266 Pa. 400) that an employee clearing wreckage from the tracks on an ash pit was not engaged in interstate commerce, there being no proof that: "The engines intending to use the ash pit were in actual operation in interstate commerce."

But even in so far as *Southern Railway v. Puckett* was decided on the authority of *Pedersen v. Delaware etc. R. R.*, neither its facts nor the language used by this Court in its opinion therein imply any extension of the doctrine announced in that case. The car inspector was participating in work necessary to put the track in fit physical condition, not only for the waiting train, but for the subsequent general traffic of the railroad, and the language of the opinion taken in its broadest meaning deals only with the maintenance of interstate tracks in proper physical condition.

A flagman at a grade crossing has a dual function: one and perhaps the principal function is what is called in *Erie R. R. v. Collins*, 253 U. S. 77, the "undesigned" function, neither interstate nor strictly intrastate, of protecting the public who use the intersecting highway. He performs for his employer its duty to

warn the public of the approach of its trains to a point, where its right of way and that of the public meet and conflict, and aids travel on the highway by indicating by his action or inaction that the crossing is clear.

But there is a second function which relates to the safety and movement of the traffic in the railroad. It is his duty, not only to keep the crossing clear from the intrusion of the public at such times as the railroad desired to exercise its paramount right of way, but to flag the trains; not only to signal the public to keep off the crossing but to signal the train to proceed, if the track is clear or, to stop, if he had been unable to exclude public traffic and so the crossing has become dangerous. He is not guarding the tracks from physical harm, as might be a watchman employed during a strike to see that the track was not torn up by the strikers. As was said by the Supreme Court of Pennsylvania in its opinion in this case (Record p. 35), "a crossing flagman is in the nature of a traffic officer who protects the public and pilots each train over the crossing; and how can it be said that he is engaged in through traffic when so conducting a local train?" His acts and duties do not operate directly on the track as tracks, it does not put them as tracks in a physical condition necessary to make them fit for use. They operate upon the particular traffics approaching the crossing. By this intelligent direction of both traffics, railroad and public, he prevents a conflict between them and in this sense makes the track safe for the particular movement of the railroad's commerce, whose approach has called for its performance. This service intelligently given as the approach of each traffic movement requires, makes the track safe in the same sense and only in the same sense that an engineer's obedience to block signals

makes that part of the line safe. Any failure on the part of either may result in a collision with its attendant delay to the particular train and obstruction of the track to the delay of the succeeding general traffic. And a failure of an engineer to observe and obey a signal closing a block to his train is far more likely to lead to a collision of sufficient seriousness as to physically injure the track and road-bed than a failure of a flagman to properly perform his duties.

It might seem idle to refer to the argument, that a flagman is to be considered as engaged in interstate commerce because his services are designated to protect the tracks of the crossing from being torn up by a collision between a train and the vehicle driven by the public over it, were it not for the fact that the Supreme Courts of both California and Illinois have in part at least based their decision that flagmen are so engaged upon the very ground. The uniform course of decision in this Court is to the effect, that it is the direct and immediate purpose and not the indirect collateral and problematical consequences of the service which are controlling and, even in these days of heavy motor vans, the risk of tearing up the road-bed by a collision between a train and public traffic at a crossing is so indirect, collateral and problematical as to amount at best to a bare possibility. The flagman does not "protect the crossing from the dangers of collision between traffic on the railroad and travel on the highways", as the petitioner contends on page 6 of his brief. He protects and pilots each particular traffic as it passes over the crossing, a very different thing. So far as the purpose of the flagman's service is to secure the safety of the particular movements of railroad traffic which from time to time pass over the crossing, by excluding the public travel while the railroad traffic

is approaching and passing over it, his duties differ only in certain unimportant and incidental particulars from that of an engineer, as his train approaches every level highway crossing, particularly those ungarded by flagman or gates. The engineer must blow the whistle and ring the bell to warn traffic on the highway that the train is approaching. And the object of this warning is to exclude the public traffic from the highway and so prevent collisions, injurious to both forms of traffic and often involving serious delay to the general traffic of the railroad. In fact a flagman in this particular is a localized specialist, placed at a particularly dangerous crossing to perform the more effectively the self-same functions required of the engineer as part of his admittedly operative duties. The mere fact that the warning is in one case by whistle and in the other by flag or raising and lowering of physical barriers, is an immaterial difference in means, due to the localization of the duty in the flagman, which permits the use of more efficient methods of warning. The purpose of the duty and the probable effect of its neglect remain the same. In the one case the act is as fully operative as in the other, in each it makes the use of the track safe for the particular movement and makes it safe because that particular movement is properly operated and the proper precaution taken for its safety.

And this is the final crux of this part of the present case. The respondent's decedent, when killed, was flagging a particular train; he was expediting its safe passage over the crossing; his services were required by its approach, they made the track safe for its use, and had no close or direct relation to the succeeding general traffic of the road. Thus they are as capable of ascription to the particular traffic movement of the

train as are the services of the crew of a switching engine, which during the day is called on to switch a constantly changing succession of interstate and intrastate cars, and like the services of such a crew, the service of the respondent's decedent takes the character of the train whose movement he was expediting and whose safety he was protecting.

There remain the cases in which the character of the services of a flagman at a railroad grade crossing have been considered by Supreme Courts of states other than Pennsylvania.

In the case of **Louisville and Nashville Railroad v. Barrett**, 143 Georgia 742, 85 S. E. 923, the Supreme Court of Georgia held that a flagman who was killed while flagging the trains was not engaged in interstate commerce, there being no sufficient evidence to show that either of the trains were engaged in interstate commerce.

In **West v. Atlantic Coast Line**, 174 North Carolina 125, 93 S. E. 479, the Supreme Court of North Carolina held that the nature of a flagman's employment depended upon the character of the train he was flagging and held that the particular flagman was engaged in interstate commerce because the train which he was flagging was itself interstate.

In the case of **Southern Pacific Railroad v. Industrial Accident Commission**, 174 California 8, 161 Pac. 1139, the Supreme Court of California, in deciding, against the vigorous dissent of Lawler, J., that a flagman at a grade crossing of an interstate railroad was engaged in interstate employment, proceeded upon what, it is submitted, was a mistaken view of the purpose of a flagman's services—which it says "extends to keeping the track in suitable condition for use as an instrumentality of commerce" (Petitioner's brief p. 8),

and which it regards as similar in principal to the track walker, whose duty it is to see that the track is "in safe condition for the passage of trains" and upon its finding that he "was actually engaged in protecting that instrumentality from harm" (Petitioner's brief p. 8). The immediately succeeding sentence, which likens the employment of a flagman to that of a guard stationed on the line to prevent persons removing rails, clearly shows that the court had in mind that he was engaged in protecting the tracks, as physical things, from the highly problematical and unlikely risk of being torn up as a result of a collision, which might occur if the flagman failed in the proper discharge of his duties.

The *dicta* in the Illinois case of *Chicago & Alton R. R. v. Industrial Commission*, 124 N. E. 344, adopt substantially the reasoning of the Supreme Court of California and add nothing thereto.

II.

The second question involved in this case is whether or not the Supreme Court of Pennsylvania erred in holding that in an action brought under the Workmen's Compensation Act of Pennsylvania the respondent made out a *prima facie* case by proving facts which brought her case within the terms of that act, and the burden is on the petitioner who interposed the Employers Liability Act of 1908 to prove facts necessary to bring the case within its terms.

1. The decision of the Supreme Court of Pennsylvania on this point follows the vastly prepondering weight of authority.

2. Even if the question was one of first impression, the nature of the respective powers under which the Employers Liability Act and the Workmen's Comp-

sation Act were enacted would have required the decision rendered.

3. And it imposes no undue hardship upon interstate carriers, in whose power in the vast majority of cases it peculiarly lies to prove the actual character of the work on which the employee is engaged. The employee on the other hand often has no knowledge or means of ascertaining the nature of the traffic he is aiding, and could only prove its character, if at all, by relying upon the records of his employer, the carrier, and making its officials his witnesses.

1. It is submitted that on this point the present case is ruled by this Court's decision in **Osborne v. Gray**, 241, U. S. 16. In that case an action was brought by a widow in her own name against the Receivers of the Chattanooga and Southern R. R. The original declaration sought recovery at common law, and though the plaintiff was permitted to file an additional count alleging the interstate character of her employment, the case was tried under the count seeking recovery at common law and the questions presented by the additional count are immaterial in the present case. The action was tried and a verdict was rendered in the plaintiff's favor. A new trial was granted and on the second trial a verdict was directed for the defendants and judgment in their favor was entered.

In affirming the decision of the Supreme Court of Tennessee, this Court said:

"And in the absence of a showing bringing the injury within the Federal Act, the question whether the declaration permitted a recovery at common law was a state question.

"It was distinctly stated by the Court of Civil Appeals that if the proof showed 'that the deceased was engaged in interstate commerce when he was injured, 'the Court would be 'compelled to hold that the trial Judge was not in error in setting aside the verdict'. But it was found that there was no basis in the evidence for such a conclusion and the second assignment of error challenges this ruling. The Court of Civil Appeals thus stated the facts:"

"The proof indicates that the deceased came into Alton Park on a passenger train, and, as a part of this train there were three cars loaded with peaches. These cars were taken out of the passenger train at Alton Park, when the train went on to Chattanooga depot. After these fruit cars were taken out of the passenger train, the deceased was directed by one of his superiors, to have them re-iced and then taken to Cravens and delivered to the N. C. & St. L. Railroad Company. The proof likewise fails to show how far through, or into what part of Tennessee the Railroad of defendant company is located, and to what point it operates trains. . . . The fruit cars which he was ordered to take and deliver to the Nashville road, so far as his record discloses, were taken out of a passenger train in Alton Park. The proof does not indicate where they came from, whether from another state, or whether they were picked up in Tennessee. . . . We do not know where the passenger train came from, nor where these fruit cars came from; all we know is, they were cut out of the passenger train at Alton Park, and the deceased was ordered to take them down into Chattanooga and deliver them to the N. C. & St. L. R. Co. This being true, the deceased and these cars were engaged in intrastate commerce when he received his fatal injury, and not in interstate commerce."

"The evidence has not been printed, but by

stipulation between the parties it is agreed that the testimony also showed that the passenger train in question had left Chattanooga at seven o'clock in the morning of the day of the accident and that it had come into Alton Park from the south, on its return trip, late in the afternoon. But this still leaves undisclosed the origin and destination of the cars in the movement of which the decedent was employed."

"It is apparent that there was no evidence requiring the conclusion that the deceased was engaged in interstate commerce at the time of his injury, and we are asked to supply the deficiency by taking judicial notice that the cars came from without the state. This contention we are unable to sustain. The make-up of trains and the movement of cars are not matters which we may assume to know without evidence. The state Court, with its intimate knowledge of the local situation, thought that such an assumption on its part would be wholly unwarranted and we cannot say that it erred in this view. The fact that Chattanooga and its suburb, Alton Park, were near the state line did not establish that the cars had crossed it. The defendants knew the actual movement of the cars, and failing to inform the Court upon this point, cannot complain that they have been deprived of a Federal right."

The vastly preponderating weight of decision in the various states in which this question has been considered is to the same effect.

In **Zavitovsky v. Chicago, Milwaukee and St. Paul R. R.** 161 Wisconsin, 461, 154 N. W. 574, a case which though not a proceeding under the Workmen's Compensation Act of that state, was in other respects similar to the present case, particularly in that the defendant therein in his answer affirmatively alleged

that the case fell under the Employers Liability Act, it was said:

"The defendant was engaged in interstate commerce and the first question which presents itself is whether the deceased employee was at the time of his injury also engaged in the same interstate commerce. The complainant manifestly predicated liability under the statutes of this state and the defendant in its answer affirmatively claimed that the case fell under the Federal Employer's Liability Act. It therefore had on this proposition a burden of proof which surely falls upon the affirmative."

In **Chicago, Rock Island and Pacific Railway v. Industrial Board**, 273 Ill. 528, a proceeding under the Workmen's Compensation act of Illinois, it was held that "the burden was upon the defendant carrier to show the Interstate Character of the cars upon which the employee was working when killed."

In **Terry v. Southern Pacific Railway Company**, 34 Cal. Appeals 33, 169 Pac. 86, it was held that, in an action at law brought by an employee of an interstate carrier to recover for personal injuries sustained through his employer's negligence, the defendant, having failed to plead that the work upon which the plaintiff was engaged when injured was interstate, could not introduce evidence to this effect in order to avail himself of the provisions of the Employer's Liability Act in regard to the assumption of risk.

In **Chicago, Rock Island and Pacific Railway v. McBee**, 45 Okla. 192, it was said:

"While state as well of federal Courts are presumed to be cognizant of the Employer's Liability Act, and to recognize that such law is supreme with respect to the responsibility of railroads engaged in interstate commerce to their em-

ployes injured or killed in such commerce, yet, before a state Court is called upon to administer the federal law in any case, the party desiring to avail himself of any right, privilege, or immunity thereunder must, by appropriate pleadings, or by evidence, bring to the attention of the Court the fact that his cause of action or his defense falls within its terms."

In **Erie Railroad v. Welsh**, 89 Ohio St. 81, it was said:

"Where it is claimed by either party to the suit that the laws of another state or the laws of the United States apply to the exclusion of the law of the forum, the facts upon which such claim is based must be pleaded and when denied by answer or reply it becomes an issue of fact for the determination of the jury."

The only case which supports the appellant's contention is **Lincks v. Erie Railroad**, 91 N. J. L. 166, an action brought under the New Jersey Workmen's Compensation Act of 1911, The Court of Error and Appeals without extended discussion of the question, laid down the broad proposition of law:

"The burden was upon the petitioner to prove a case within the state statutes, that is to show affirmatively that the plaintiff's decedent was engaged in a service which was not regulated by the federal statutes, for that fact is not to be presumed in the absence of proof."

On page 25 of his brief the petitioner attempts to distinguish the present case from **Osborne v. Gray**, supra, on the ground that "this is not, like **Osborne v. Gray**, a case where the Court has the requisite jurisdiction and where the only question is whether the provisions of a Federal or State Statute should be ap-

plied. The compensation tribunals have not jurisdiction unless the parties are engaged in intrastate commerce."

Yet the only decision in which it says that this distinction "clearly appears" is that of the New Jersey Court of Errors and Appeals in **Lincks v. Erie Railroad**, 91 N. J. L. 166, which arose under the New Jersey Workmen's Compensation Act of 1911, which placed original jurisdiction in the Court of Common Pleas, whose jurisdiction is general.

But apart from this, it is submitted that this attempted distinction is unsound. It implies that the Employer's Liability Act has some peculiarly paramount force over Workmen's Compensation Acts, which it does not have over the common or code law of a state or over the more usual kind of statute, such as state Employer's Liability Act or Acts, like that in *Osborne v. Gray*, permitting recovery for death wrongfully caused. And it confuses the special jurisdiction of the compensation tribunals specifically limited by the very acts which create them with the power of a state to regulate and legislate upon affairs of local concern, which is unlimited save where it conflicts with a paramount Act of Congress occupying a part of the same field.

While in *Osborne v. Gray* the Court in which the proceedings were brought had jurisdiction to enforce either the State or Federal Act as the proven facts might require and compensation tribunals are restricted to administering a particular state act, this difference is immaterial. The controlling factor is whether the state has the power to regulate the subject matter of this action, not whether it has chosen to exercise its power through a special tribunal of limited jurisdiction rather than through its existing Courts of general jurisdiction.

In the present case, as much as in *Osborne v. Gray*, the only question is whether the State or Federal Act applies. If the Workman Compensation Act applies, it is as effective to confer jurisdiction upon the Workmen's Compensation Board as it is to fix the rights and liabilities of the parties. In the one case, as in the other, the controlling question is whether the State has the power to legislate upon the subject matter of the particular case, for if it has it may confer jurisdiction as it sees fit upon its existing tribunals of general or special jurisdiction, or may create a new tribunal to administer the particular act.

If in *Osborne v. Gray* "in the absence of a showing bringing the injury within the Federal Act, the question whether the declaration permitted a recovery at common law was a state question," as was said by this Court, so in the present case, the question whether the respondent has alleged and proved a case within the terms of the Workmen's Compensation Act and so within the special jurisdiction conferred by it upon the Workmen's Compensation Board is also a state question as to which the decision of the Supreme Court of Pennsylvania is final and conclusive. If in *Osborne v. Gray*, the defendants, who failed to show the actual movement of the cars in question, "can not complain that they have been deprived of a Federal right," neither can the petitioner here so complain, since it has failed to show the character of the train which the respondents' husband was flagging when he was killed. If in *Osborne v. Gray*, the inherent power of the State to legislate upon matters of local concern remained unimpaired in the absence of a showing that the case fell within a field from which the State had been excluded by its occupation by a paramount Act of Congress, so here it must remain unimpaired until there is proof

that the case falls within the terms of the Employer's Liability Act.

The case of *Charles v. Smith*, 29 Pa. Superior Court 594, relied upon by the petitioner. (Petitioner brief, pages 26 and 27) is not in point. As was said in the opinion of the Supreme Court of Pennsylvania: "The Federal Employer's Liability Act, applicable to interstate commerce only, bears no analogy to the Federal Bankruptcy Act which is of general application."

The Constitution of the United States, Article I, Section 8, Clause 4, expressly gives to Congress the power to "establish uniform laws on the subject of bankruptcy throughout the United States." This power is general over all debtors, natural and corporate, without distinction of trade, business, occupation, or lack of occupation. On the other hand, no power is expressly given to Congress to determine the liability of an employer whose employee is killed or injured in his services. The power of Congress to enact an Employer's Liability Act is derived from its power to regulate commerce between the several states, and is limited to an employee suffering injury or death, not only while in the employment of an employer, a part or even the greater part of whose business is interstate, but also while the employee is himself engaged in interstate commerce.

Not only are the powers exercised in the Bankruptcy Act and the Employer's Liability Act essentially different but the Bankruptcy Act is general in its terms while the Employer's Liability Act is expressly limited to injuries sustained by employees of carriers by rail who are themselves engaged in interstate commerce.

The Bankruptcy Act, Chapter III, Sec. 4, provides that "any person" with the exception of certain speci-

fied corporations "shall be entitled to the benefits of this Act as voluntary bankrupts" and that "any natural person, except a wage earner or a person chiefly engaged in farming or tilling the soil" * * * owing debts to the amount of one thousand dollars may be adjudged an involuntary bankrupt." By the very generality of its terms it asserts its power over the entire field—though by the exception of certain classes of debtors it relinquished its paramount control over them and reopens this part of the field to state regulation.

2. The power of a state to determine, by judicial decision interpreting its common law or by legislative acts, the rights and liabilities arising out of industrial accidents, is not conferred upon the state by its own or the National Constitution. It is inherent in its right as sovereign to regulate the relation of its citizens *inter se* and is unlimited, except in so far as it is restricted by the State or National Constitution or by some exclusive or paramount power delegated to Congress. The power of Congress to legislate on the subject is incidental to its delegated power to regulate commerce between the states and with foreign nations. Congress has no power to legislate in regard to industrial accidents merely as such. Its power is conditioned upon the accident being sustained in the course of interstate commerce—not merely in the service of an employer engaged therein. The employee as well as the employer must be engaged in interstate commerce at the time of the accident to bring it within the power of Congress. *The Employer's Liability Cases*, 207 U. S. 463.

Since the subject matter of industrial accidents, even those occurring in interstate commerce, is a mat-

ter of local concern, the power of Congress over it, while paramount, is not exclusive. The field is not closed to state regulation because of, and to the full extent of, the power which Congress might exercise over it. It is open until Congress has exercised its power by appropriate legislation, and even then only so much of the field is closed as Congress had chosen to occupy by such legislation.

He who asserts that the otherwise complete and sovereign power of a state to regulate matters of local concern is superceded or suspended in a particular case by an Act of Congress, must show that such case falls within the field over which power has been delegated to Congress, else its Act though expressly purporting to deal with it would be in excess of its power and unconstitutional. And he must also show by appropriate pleading and by the production of sufficient evidence to support it, that the particular case falls within that part of the field occupied by such Act. One asserting that the Employer's Liability Act suspends as to the particular industrial accident the common or statute law of a state, must make it appear by averment as the petitioner did (Record p. 10), and by proof, which it did not, that the employee, when injured or killed, was himself engaged in interstate employment for an interstate employer.

The respondent made out a *prima facie* case for the exercise of the State of Pennsylvania's general power over the relations of its citizens *inter se*, by alleging and proving an accident occurring within its boundaries, she was not bound to prove that her decedent was engaged in intrastate commerce—since the states power to deal with industrial accidents is not derived from any power reserved by it to regulate intrastate commerce. It was for the petitioner to show

that in this case the Workmen's Compensation Act was superceded by the Employer's Liability Act by proving that the circumstances brought it within the terms of that paramount act of Congress.

3. Not only is that part of the decision of the Supreme Court of Pennsylvania, which places upon the interstate carriers the burden of proving the facts, which show that their employees were engaged in interstate commerce, when injured or killed, supported by the weight of authority and required by the respective natures of the powers of the state and Congress, but it is also in itself just and necessary to secure to the victims of industrial accidents the benefits, which Workmen's Compensation Acts are designed to give them. Such carriers have in all cases as great or greater knowledge of these facts and in many cases they have the exclusive knowledge and power of ascertaining them. On the other hand there are many constantly occurring cases where the interstate or intrastate nature of the employee's service depends on facts, of which he, if injured, and even more his dependents, if he is killed outright, can know nothing and which they can only ascertain from the officials and records of the carriers.

While in the present case it may be difficult for the petitioner to identify the particular train which the respondent's husband was flagging when killed—it is at least as difficult for the respondent to supply this information. Surely in the majority of cases, in which a flagman is killed at a crossing, the carrier must receive a report from the crew of the train running him down, which will enable it to ascertain the train which he was flagging when killed. But even if the widow of the flagman can identify the train, this is

only the first step in her proof, there remains the task of proving the character of the commerce in which it was engaged. Even if she happens to be able to prove that the train was moving between termini both within the state, this alone is not decisive. The presence on the train of even a single through passenger or a single piece of freight billed to a point outside the state makes the train as much interstate as though it were itself enroute to such a point. And this difficulty of proof is not peculiar to flagmen. It applies equally to any service, such as that of a train or switching crew, which directly aids a particular traffic movement and so takes on the nature of that movement.

Courts are naturally and properly reluctant to place upon a party the burden of proving facts which lie peculiarly or exclusively within his opponent's knowledge, and many presumptions owe their existence to the obvious injustice of requiring strict proof from one who has no power to produce it. And it submitted that it is a strong argument against the petitioner's contention, that it would relieve carriers from the burden, which they can easily bear, of proving facts peculiarly and often exclusively within their knowledge and transfer that burden to their employees, who often have neither the knowledge of such facts nor the power to ascertain them, which is necessary to enable them to successfully sustain it.

4. The petitioner contends (Petitioner's brief, pages 20 and 21), that this Court having held in *New York Central Railroad v. Winfield*, 244 U. S. 147, that: "The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce are regulated, both inclusively and exclusively, by the Federal Employers' Liability Act; and

Congress having thus fully covered the subject, no room exists for state regulation, even in respect to injuries occurring without fault;" the Pennsylvania Compensation Act of 1915 "therefore, must now be read as if it set forth in terms that it applied to all accidents occurring in Pennsylvania except in domestic, in agricultural and in interstate employment."

It is submitted that there is nothing in the decision of this Court in *N. Y. C. R. R. v. Winfield* or in the language of its opinion therein which justifies this contention. So far as the legislative purpose expressed in the Workmen's Compensation Act is material, it is to be ascertained from the language of the Act. Its intention once so ascertained is to be applied, subject to the principle of constitutional law laid down by this Court in *N. Y. C. R. R. v. Winfield*. That principle operates of its own force to limit the effect of a legislative intent, no matter how clearly expressed in a state statute, if that intent is to regulate a subject already covered by a paramount act of Congress.

Since the intention of the state to regulate or refrain from regulating such a subject is immaterial, it is of no service to attempt to imply an interpellated clause which expresses its recognition of its impotence to deal with the subject.

5. In conclusion it is submitted that the position taken by the petitioner here is inconsistent with the third clause of its answer to the respondent's claim petition (Answer, Record, page 10), which denied that it "is liable to pay compensation under the facts alleged in the claim petition, for the following reasons: because while in the course of his employment on March 18, 1918, the decedent was engaged with the defendant in interstate commerce." It is hard to conceive of language more appropriate than this to set

forth as an affirmation defense that the decedent was engaged in interstate commerce, with the necessary implication that the defendant's liability for his death, while so engaged, was within the terms of the Employer's Liability Act, and that therefore, the Workmen's Compensation Act could not apply to the case.

The petitioner seeks to avoid the effect of its answer by contending (Petitioner's brief, page 22), that, as it was required to answer specifically, it could not demur and that "this clause of its answer was not to introduce a new element into the case but was a denial of the claimant's allegation that the employment was within the provisions of the Workmen's Compensation Act." As to this it is enough to say, that while the pleadings under the Compensation Act are informal and the defendant is required to answer specifically, and may not file a technical demurrer, yet defendants can and in practice constantly do file answers, which are in substance demurrers, denying liability because the facts alleged in the claimant's petition do not show that the claimant is entitled to compensation under the terms of the Act. Had the petitioner at that time believed that the claimant must allege and prove facts to negative the applicability of the Employer's Liability Act, its obviously proper course was to file such an answer. Having chosen instead to enter an affirmative plea, alleging that the decedent was engaged in interstate commerce, it can not now complain that it was required at its peril to follow up its averment with evidence sufficient to prove it.

Respectfully submitted,

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Counsel for Respondent.

No. 297.

OCTOBER

APR 25 1921
JAMES D. MAHER,
CLERK

IN THE
Supreme Court of the United States

PHILADELPHIA AND READING RAILWAY COMPANY,
Petitioner,

vs.

MARIA DOMENICA DiDONATO, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA.

PETITIONER'S REPLY BRIEF.

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415 READING TERMINAL,
PHILADELPHIA.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. 297.

Philadelphia & Reading Railway Company, Petitioner,

vs.

Maria Domenica DiDonato, Respondent.

PETITIONER'S REPLY BRIEF.

FIRST QUESTION INVOLVED.

IS A WATCHMAN EMPLOYED ON AN INTERSTATE RAILROAD AT A GRADE CROSSING OVER WHICH INTERSTATE SHIPMENTS AND TRAINS CONSTANTLY PASS ENGAGED IN INTERSTATE COMMERCE WHILE PERFORMING HIS DUTIES IN FLAGGING TRAINS OVER THE CROSSING?

The respondent states the question thus:—

“The first question involved in the present case is whether or not the Supreme Court of Pennsylvania erred in holding that the interstate or intrastate character of the employment or service of a flagman at a grade crossing of an interstate

railroad depends on the character of the particular train which he was flagging when injured."

Now, the Supreme Court of Pennsylvania held that "it does not appear to which branch of the service the train he was flagging belonged" (Record, page 34); and concluded that "a crossing watchman, while flagging an intra-state train, is not employed in interstate commerce, although trains engaged in such commerce use the same tracks" (Record, page 35). This contradiction was made the subject of the petitioner's second specification of error.

Broadly speaking, we may agree with respondent that the cases fall into two classes—one ruled by *Illinois Central Railroad Company v. Behrens*, 233 U. S. 473, and the other by *Pedersen v. D. L. & W. Railroad Co.*, 229 U. S. 146. In respondent's brief (page 2), the first is designated as that in which the service is given in relation to some specific traffic movement; the second, as that in which it is impossible to assign the service to any particular traffic movement.

No doubt many of the cases are consistent with this classification, but it by no means follows that an incident common to many cases in a class may be assumed as a test to determine whether a case properly belongs therein. Yet on page 3 of respondent's brief it is stated that: It is only where it is impossible to ascribe the particular service, on which the employee is engaged at the time of his injury, to some particular traffic movement that the general nature of his employer's business controls. It is then asserted that the service in the present case may be ascribed to a particular traffic movement, therefore it must fall within the first class and cannot be ruled by the *Pedersen* case. No such test appears to have been suggested by any Court, and we do not think it will bear examination. However this may be, if the facts bring the case within the doctrine of *Pedersen* and the decisions of this Court which follow it, those decisions are certainly controlling.

Respondent cites the following case, which if considered would seem to be conclusive on this branch of the argument.

Erie Railroad Co. vs. Collins, 253 U. S. 77, 82:

"Defendant is an interstate railroad and upon its line running from other States to New York it operated in New York a signal tower and switches, to attend which plaintiff was employed. It also had near the tower a pumping station, consisting of water tank and a gasoline engine for pumping purposes, through which instrumentalities water was supplied to its engines in whatever commerce engaged.

"While in attendance at the pumping station plaintiff was injured. And such is the case, that is, while in attendance at the pumping station, it being his duty to so attend, was he injured in interstate commerce?

"It can hardly be contended that while plaintiff was engaged in the signal tower he was not engaged in interstate commerce, though he may have on occasion signalled the approach or departure of intrastate trains. But it is contended that when he descended from the tower and went to the pumping station he put off an interstate character and took on one of intrastate quality or, it may be, was divested of both and sank into undesignated employment. A rather abrupt transition it would seem at first blush, and, if of determining influence, would subject the Employers' Liability Act to rapid changes of application, plaintiff being within at one point of time and without it at another—within it when on the signal tower, but without it when in the pump house, though in both places being concerned with trains engaged in interstate commerce."

The Court, after reviewing the authorities, continued as (page 84) :—

"These, then, being the cases, what do they afford in the solution of the case at bar? As we have said regarding the essential character of the two commerces the differences between them is easily recognized and expressed, but, as we have also said, whether at a given time particular instrumentalities or employment may be assigned to one or the other may not be easy, and

of this the cases are illustrative. What is their determining principle?

"In the Pedersen case it was said that the questions which naturally arise: 'Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it'? Or, as said in *Shanks vs. D. L. & W. R. R. Co.*, was the 'work so closely related to it (interstate commerce) as to be practically a part of it'? The answer must be in the affirmative. Plaintiff was assigned to duty in the signal tower and in the pump house, and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes therefore within the indicated test. It may be said, however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true, but his duty there was performed and the instruments and facilities of it were kept in readiness for use and were used on both commerces as were demanded, and the test of the cases satisfied."

Now, the service of an operator in a signal tower can be ascribed to a particular traffic movement,—an approaching train governed by his signals may be either in intrastate or interstate commerce, yet nothing can be more certain than that duty in a signal tower comes within the test indicated in the Pedersen case. Like the crossing watchman, the tower man may perform other duties incidental to the main purpose, which is protection against the danger of collision. Respondent's counsel scout the notion that damage to the tracks may result. They say that the risk is so "indirect, collateral and problematical as to amount at best to a bare probability." The common experience of mankind asserts the contrary. Collisions frequently cause derailments and derailments almost invariably tear up the track with resultant delays to traffic.

Now can the service of these two employees be distinguished? Their duties as signallers were identical; the crossing watchman signalled by holding up a disc or waving a flag or lamp; the other by throwing a lever which raised or dropped a semaphore arm or showed a light. If the signal apparatus is an instrumentality of interstate commerce in one case, so it may be deemed in the other. To hold otherwise would result in a curious situation. The crossing at Forrest Street, Conshohocken, was protected by safety gates operated by DiDonato, which were as certainly instrumentalities of interstate commerce as any other part of the right-of-way. Such gates are lowered just before an approaching train is signalled to advance. If, as contended for the respondent, the watchman takes character from that train, then if it was an intrastate train we should have him in interstate commerce while lowering the gates and without it when he took to his flag, a transition more abrupt than that commented on by this Court in the Collins case, within it when operating an instrumentality of such commerce and without it when directly signalling the train with his flag, although both actions were concerned with the essential duty of protecting against the dangers of collision.

In **Erie Railroad Company vs. Szary**, 253 U. S. 86, 89, the Court said:

"We think these facts bring the case within the Collins case and the test there deduced from prior decisions. There were attempts there, and there are attempts here, to separate the duty and assign it character by intervals of time, and distinctions between the acts of service. * * * The distinctions are too artificial for acceptance. The acts of service were too intimately related and too necessary for the final purpose to be distinguished in legal character."

The following cases cited in respondents' brief, page 11, are neither of them strictly in point.

L. & N. Railroad Co. vs. Barrett, 143 Ga. 742, 85 S. E. 923:

There a widow instituted an action for damages on account of the death of her husband, who was alleged to have been killed by a train on the defendant's railroad, while he was engaged as watchman at a grade crossing in a city, to warn travelers on the highway of the approach of trains. The parties had gone to trial on the issue raised by the pleadings, which only stated a cause of action under the State law. The defendant attempted to prove facts to show that at the time of the accident, the crossing watchman was engaged in interstate commerce. This evidence was excluded on the ground that the plea of the defendant did not authorize the introduction of evidence on that subject. The Supreme Court held that there was no error in that ruling. Notwithstanding the exclusion of this evidence, other evidence was admitted without objection, which the defendant contended was sufficient to show that plaintiff's husband was engaged in interstate commerce at the time he was killed. The Court, on the ground that the only duty of the watchman appears to have been to protect travelers on the street, and at the time of the accident he was engaged in warning travelers on the street, decided that the evidence was insufficient to show that the plaintiff's husband was engaged in interstate commerce and there was no error in refusing to charge the jury that, as a matter of law, he was so engaged and that for such reason the plaintiff could not recover.

It will be observed that in this case the trial court had jurisdiction of the subject matter of the suit, whether the plaintiff's decedent was engaged in interstate commerce or not, and the jurisdiction of the court was not challenged. Furthermore under the evidence it appeared that the deceased had nothing to do with the operation of trains, his only duty being to warn travelers on the highway.

West vs. Atlantic Coast Line, 174 N. C. 125, 93 S. E. 479.

This was a suit brought under the Federal Employers' Liability Act, and it was shown that the crossing watchman, having flagged an interstate train, as soon as it had stopped, himself went upon the platform of the standing train. In the act of stepping to the ground, it started suddenly and, with a jerk, throwing the plaintiff off. It was held that, as he was assisting the engineer in the operation of an interstate train over the crossing, he was engaged in interstate commerce.

This we suppose will be conceded by everyone, but the case has no application here.

SECOND QUESTION INVOLVED.

"SINCE IN AN ACTION BROUGHT UNDER THE WORKMEN'S COMPENSATION ACT OF PENNSYLVANIA, THE BURDEN IS UPON THE CLAIMANT TO PROVE A CASE WITHIN THE ACT, WAS A PRIMA FACIE CASE MADE OUT BY PROOF THAT CLAIMANT'S HUSBAND WAS EMPLOYED AS A CROSSING WATCHMAN BY A COMMON CARRIER BY RAIL AND THAT HE WAS INJURED WHILE ENGAGING IN THE COMMERCE CONDUCTED BY THE CARRIER OVER THE TRACKS AT THE CROSSING?"

This question is thus stated in the respondent's brief, (page 12):

"The second question involved in this case is whether or not the Supreme Court of Pennsylvania erred in holding that in an action brought under the Workmen's Compensation Act of Pennsylvania the respondent made out a prima facie case by proving facts which brought the case within the terms of that act, and the burden is on the petitioner who interposed the Employers Liability Act of 1908 to prove facts necessary to bring the case within its terms."

To state the question thus, we submit, is to assume the point in controversy. If the respondent proved a case with-

in the Act, she made out a case *prima facie* and the question for argument could not arise. The error of which petitioner here complains is that in the face of an express finding that it could not be determined from the testimony whether the decedent was engaged in an interstate or intrastate activity (record, pages 23 and 34), the Supreme Court of Pennsylvania held that the respondent made out a *prima facie* case and that the crossing watchman was engaged in intrastate commerce.

It is then asserted (page 12, respondent's brief) that "the vastly prepondering weight of authority" sustains the ruling of the Supreme Court of Pennsylvania as to the burden of proof. The only Federal case cited is that of **Osborne vs. Gray**, 241 U. S. 16:

This was an action by a widow, in her own name, to recover damages from the Receiver of the Chattanooga Southern R. R. Co. for the negligent killing of her husband. The original declaration sought recovery for negligence at common law and did not allege an injury while engaged in interstate commerce. An additional count was afterward filed, subsequently amended to aver interstate employment at the time of the injury. A verdict for the plaintiff was had, judgment entered and thereupon the trial judge granted a new trial on the ground that he had erred in his charge with respect to the burden of proof. At the second trial a verdict was directed for defendant, (the plaintiff-in-error) and judgment entered. The State Appellate Court reversed the second judgment and reinstated the first. It did not consider the record of the second trial, holding that the first verdict should not have been set aside. Error assigned was (1) That the Court erred in not holding that both counts stated a case under the Federal Act and so the widow could not recover in her own right; and (2) That the Court erred in not holding that the evidence at the first trial showed a case within the Federal Act.

In support of the first assignment it was insisted that the amendment inserting the interstate question

amended both counts of the declaration. The State Court held it did not and the declaration was deemed to contain two counts, one under the common law of Tennessee, the other under the Employers' Liability Act. The Supreme Court of the United States held the question unimportant for if it had been shown that the injury occurred in interstate commerce the presentation of the claim in an alternative way by separate counts would not have deprived the defendants of the right to insist on the Federal Law as the exclusive measure of their liability. The plaintiff proved the injury occurred in Tennessee. The testimony was not printed, but the evidence recited in the opinion showed no more. This recital was supplemented by stipulation filed by agreement between the parties, and this failed to disclose any interstate feature. The defendant contended that the Supreme Court of the United States could supply the deficiency by taking judicial notice that certain cars really came from without the State. The Court said it could not do so without evidence and observed that the defendants knew the actual movement of the cars and failing to inform the court of any interstate movement could not complain that they had been deprived of a Federal right. Further that the question whether the declaration permitted a recovery under the common law of Tennessee was purely a state question. The case has nothing to do with the burden of proof in regard to the question raised here. The plaintiff made out a case under the State Law which the defendants failed to rebut.

It is submitted that the case has no application here. Gray had left the passenger train, which proceeded on its way, as he had been directed to look after the icing of certain cars taken from that train, and certainly unless these cars were in the course of an interstate journey, his duty in relation to them could not place him in interstate commerce. There was no proof of this and certainly the

Court could not take judicial notice of the origin or destination of the cars. Here was a *prima facie* case of negligence proved under the common law of Tennessee. This was held to be unaffected by the fact that the plaintiff had failed to prove the averments of an alternative count setting up an interstate engagement. The respondent concedes that had Donato been flagging an approaching interstate train, he would have been within the Federal Act. Does she then prove, as Gray did, a case within the State law? Not at all, she proves nothing except that her decedent was engaged in some kind of commerce and her counsel argue that she need prove no more, because Pennsylvania is a sovereign state and has a right to legislate for intrastate employees. Nobody disputes this; let there be proof that Donato was acting as an intrastate employee and if the employer cannot prove the contrary, compensation should be awarded.

Cases from Wisconsin, Illinois, California, Oklahoma and Ohio are cited to show that "the vastly preponderating weight of decision in the various states in which this question has been considered" sustains the Supreme Court of Pennsylvania. In no one of them does the question appear to have been raised.

In *Zavitowsky vs. Chicago, Milwaukee & St. Paul R. R.* 161 Wis. 461, 154 N. W. 974.

an administrator brought suit against the defendant for negligently causing the death of one of its employees. The Court was one of general jurisdiction and the question was whether the provisions of the State or Federal law should be applied. The trial Judge directed a verdict for the defendant on the ground that the evidence brought the case within the Federal Employers' Liability Act and conclusively showed an assumption of risk by the deceased under that Act. The State Supreme Court thought the evidence did not have that effect and said that the complaint manifestly predicated liability under the Statutes of the State and that

the defendant had not shown any facts to bring the case within the Employers' Liability Act.

Terry vs. Southern Pacific Railway Company,
34 Cal. Appeals 33, 169 Pac. 86.

This was an action at law and the plea filed by the defendant did not set up that the employee was engaged at any work related to interstate commerce. This question was not raised until the case was in the Appellate Court, where it was held to be too late to raise it. The defendant having failed to plead that the work in which the plaintiff was engaged was in interstate commerce was not entitled to introduce evidence to that effect under the issue of assumption of risk which is available under the Federal Statutes.

In Chicago, Rock Island & Pacific Railway vs. McBee, 45 Okla. 192, 145 Pac. 331, the Court said:—

"In the trial Court both the plaintiff and defendant treated the case as one arising under the State statute. Nowhere in the petition is it alleged that the injuries which caused the death of plaintiff's intestate were received while he was engaged in interstate traffic, nor did the defendant, in its answer or upon the trial, attempt to invoke any right, privilege or immunity which it is claimed it might have asserted under the Federal Act. * * * It is a rule of universal application that, where both parties to a cause act upon a particular theory of the cause of action, they will not be permitted to depart therefrom when the case is brought to an Appellate Court for review."

In Erie Railroad Co. vs. Welsh, 89 Ohio St. 81, the action was at law in a court of general jurisdiction, setting up a case of negligence under the State law, which the defendant denied and set up the plaintiff's contributory negligence. On the appeal it was claimed that the case was governed by the Federal Employers' Liability Act. The Court said that this issue was not joined by the pleadings. If the defendant

below should fail to plead facts that would take the transaction out of the law of the forum and bring it within the operation of Federal law, then it could not be permitted over the objection of the plaintiff to introduce any evidence in proof of such facts, because no such issue is presented by the pleadings.

Clearly none of these cases support either the respondent's argument or the ruling of the Supreme Court of Pennsylvania, which in fact did not rely on them, but rested the case on *Osborne vs. Gray*, *supra*, and its own decision in *Hench vs. Pennsylvania Railroad Company*, 246 Pa. 16, which is discussed on page 23 of petitioner's brief, and *Hancock vs. P. & R. Ry. Co.*, 264 Pa. 220, which was reversed by this Court in *P. & R. Ry. Co. vs. Hancock*, 253 U. S. 283. The only case cited that supports respondent's contention is that of *Chicago, Rock Island and Pacific Railway vs. Industrial Board*, 273 Ill. 528, in which it was contended for the defendant that because there was interstate freight in a railroad yard which the plaintiff, who was a detective, was watching, he was engaged in interstate commerce. The Court seemed to think it important to know the contents of certain cars upon which the plaintiff was riding to get to another part of the yard, on the theory that if he was working on these cars, and they were interstate cars, he would be in interstate commerce. It seems clear that he had no duties to perform in relation to the movement of these cars and was simply using them as a convenient means of going down the yard. The Court held that if the interstate cars in the yard were a part of the draft upon which the man was hanging at the time of his injury, the burden was upon the railroad to show that fact. The question, however, with which we are concerned does not appear to have been raised or argued.

The case of **Lincks vs. Erie Railroad**, 91 N. J. L. 166, which is strictly in point, respondent's counsel seek to overthrow by asserting that the Court was one of general

jurisdiction. If it was so, it is submitted that it is immaterial, as it is generally held that there is no presumption of jurisdiction where a Court, although of general jurisdiction, exercises special statutory powers in a special statutory manner, or otherwise than according to the course of the common law (*Galpin vs. Page*, 18 Wall, 350, Brief for Petitioner, page 17).

The respondent in conclusion asserts that the position taken by the petitioner here is inconsistent with the third clause of its answer to the respondent's claim petition, set forth in the record at page 10, the words being "the defendant denies that he is liable to pay compensation under the facts alleged in the claim petition, for the following reasons." These words are printed by the Compensation Bureau in their form of answer, and the defendant is required by its rules to state a reason for disclaiming liability thereafter. But it is submitted that since the Workmen's Compensation Board treated the answer as a challenge to its jurisdiction (*Opinion, Record, page 22*), and the Supreme Court of Pennsylvania assumed or decided that the record presented that question and decided it against the party asserting it, this Court has jurisdiction to review the judgment. *North Carolina Railroad vs. Zachary*, 232 U. S. 248; *Miedreich vs. Lauenstein*, 232 U. S. 236.

The burden here was upon the respondent to prove a case within the Compensation Act. Although the judgment below is clearly based on the theory that an intrastate train was approaching, it is found that there is no proof as to its character. It would seem then that the judgment has no foundation of fact upon which to rest. There was no burden of evidence upon the petitioner to rebut a fact or presumption that did not exist.

Respectfully submitted.

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